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No.

In the Supreme Court of the United States

October Term, 1980

JUNEAU SQUARE CORP., et al.,

Petitioners,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW*

1. Where the jury verdict was supported by "sufficient evidence," whether the plaintiffs were erroneously and unconstitutionally deprived of a jury trial when the district court formulated its own view of the evidence and set aside the verdict because the jury's view of the evidence was inconsistent with that of the district court?

2. Whether the scope of appellate review of an order granting a new trial is the same as for review of an order denying a new trial?

3. Whether the district court acted erroneously and outside its jurisdiction in granting a new trial on grounds not stated in the defendants' new trial motion, without granting plaintiffs a hearing pursuant to F.R.Civ.P. 59(d)?

4. Whether the court of appeals committed plain error as to certain matters essential to its decision affirming the new trial order?

5. Whether the court of appeals decision is in conflict with decisions of this court and of other courts of appeals in holding that the plaintiff in a private antitrust action under Section 1 of the Sherman Act must prove actual injury to competition?

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* List of all parties to the proceeding in the Circuit Court of Appeals: the plaintiffs-appellants were Juneau Square Corp., Ralph W. Conway, Hal Bradley & Associates, Inc., Emil Bartel, Anna Bartel and Vionne Perry, as administratrix of the Estate of Thomas H. Perry. The defendants-appellees were First Wisconsin Corporation, a bank holding company, its subsidiaries First Wisconsin National Bank of Milwaukee, First Wisconsin Development Corporation and Marshall-Wisconsin Company, Inc., sometimes referred to collectively herein as the "First Wisconsin defendants", and Marshall-Michigan Company, Inc. Aetna Life Insurance Company was also a defendant-appellee but participated only in the first trial.

6. Whether the court of appeals' decision is in conflict with decisions of other circuits in holding that the use of unfair means by one major competitor to destroy another is illegal per se when done for the purpose of destroying competition?

7. Whether this court's power of supervision is called for because the court of appeals sanctioned radical departure from the accepted and usual course of judicial procedures by the district court in awarding a new trial on insubstantial and speculative grounds and through pervasive error which deprived plaintiffs of a fair hearing in the second trial?

8. Whether proof of an exact market share is necessary to establish attempt to monopolize, where direct proof exists of the defendants' possession and use of the power to fix prices or exclude competition?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on July 3, 1980.

REFERENCES TO OPINIONS BELOW

The opinions of the District Court appear in the appendix and are reported as follows:

A. Order granting in part and denying in part defendants' motions for directed verdict (first trial): not reported; App. 31.

B. Order granting defendants new trial: 435 F. Supp. 1307 (1977); App. 51.

C. Order denying certification for interlocutory appeal (first trial): not reported; App. 97.

D. Order granting in part and denying in part defendants' motion to dismiss for lack of standing (second trial): not reported; App. 107.

E. Order dismissing plaintiff Wil-Ten for lack of standing (second trial): not reported; App. 135.

F. Order denying plaintiffs permission to litigate certain issues or to amend pleadings (second trial): not reported; App. 136.

G. Order denying plaintiffs' motion for a new trial (second trial): 475 F. Supp. 451 (1979); App. 138.

The opinion of the Circuit Court of Appeals is reported in 624 F.2d 798 and appears at App. 1.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Seventh Amendment to the Constitution is involved, as are Sections 1 and 2 of the Sherman Act and Section 4 of the Clayton Act, the relevant portions of which are:

AMENDMENT 7

. . . [N]o fact tried by a jury shall be otherwise reexamined in any Court of the United States than according to the rules of the common law.

SECTION 1 OF THE SHERMAN ACT

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . (15 U.S.C. §1; 26 Stat. 209; 50 Stat. 693; 69 Stat. 282; 69 Stat. 282; 88 Stat. 1708)

SECTION 2 OF THE SHERMAN ACT

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . (15 U.S.C. §2; 26 Stat. 209; 69 Stat. 282; 88 Stat. 1708)

SECTION 4 OF THE CLAYTON ACT

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (15 U.S.C. §15; 38 Stat. 731)

STATEMENT OF THE CASE

This civil antitrust action seeks recovery under Sections 1 and 2 of the Sherman Act and Section 4 of the Clayton Act. The jurisdiction of the district court was based upon 28 U.S.C., §1331(a).

Juneau Square Corp. and the other plaintiffs were developers of a major office complex known as Juneau Square in the Central Business District (CBD) of Milwaukee, Wisconsin.

The gravamen of this case is the motive for and manner of the First Wisconsin defendants' elimination of competition in the office rental market in the Milwaukee CBD by agreement with one potential major competitor, Northwestern Mutual Life Insurance Company (NML), and, by concerted actions among themselves and with others, the direct destruction of their other major competitors—the plaintiffs—in taking over two existing buildings owned by the plaintiffs and preventing construction of a third building.

The First Wisconsin Corporation and NML are by far the largest financial institutions in Milwaukee. Their boards are interlocked with five common directors. They routinely acted as one another's agents in acquiring CBD real estate.

The First Wisconsin companies are the dominant owners and lessors of competitive office space in the CBD. Their new First Wisconsin Center office building, which they sought to shield from competition, brought approximately 1 million square feet of new competitive office space on the market. This was a five year supply in the Milwaukee CBD, which could absorb 200,000 square feet of new space annually.

NML also owned and operated competitive office space and owned large amounts of other developable land in the CBD. By the end of 1968 NML had obtained the lead tenant and commenced architectural work for a large office building in the CBD, next to Juneau Square. In late 1968 the First Wisconsin companies decided to build their new Center in the same area. Pursuant to a documented series of contacts between the president of First Wisconsin Corporation and the president of NML, NML agreed to shelve its own building plans, transferred its land on the block to the First Wisconsin and acted as agent in acquiring additional land for First Wisconsin's proposed building. NML deferred its own building plans for five years, which permitted the First Wisconsin to lease up its new building without competition from NML. It was agreed NML's interim space needs would be accommodated in the First Wisconsin's new building.

After the arrangements with NML, First Wisconsin's most significant remaining competition was Juneau Square. The plaintiffs had already built two office buildings in the project, Juneau Square North and South. Their proposed new Juneau Square East tower would offer 300,000 feet of first class office space with earlier occupancy, a preferabl location and an unobstructed lake view. Had Juneau Square East been completed and had the project remained in plaintiffs' hands, their ownership of 442,000 square feet would have made them the second largest office space competitor in the CBD, after the First Wisconsin companies.

Other background facts leading up to the conspiracy are summarized by the court of appeals (App. 1-4) and the district court (App. 54-56).

In March 1969 the chief real estate officer of the First Wisconsin Corporation (Holscher) and its attorney (Shute of Foley & Lardner) sent written instructions to a Chicago attorney (Shapiro) secretly to contact Aetna Life Insurance Company, which had financed the Juneau Square project from its inception and with which Juneau Square Corp. was negotiating long term financing to complete the project. This remarkable memorandum (App. 169-179) establishes the First Wisconsin's intention to take over the entire Juneau Square block; misuse of confidential credit information;[1] use of surreptitious means to contact a Juneau Square financing source and deliberate timing of that contact to kill an active financing negotiation. It also sets forth a "strategy" for a takeover that employed the leverage over the Juneau Square developers which Aetna had as mortgagee on the existing project.

Aetna denied financing to complete the project. Except for the Shute/Shapiro memorandum,[2] plaintiffs cannot document that contact was made by the First Wisconsin's agent (Shapiro) prior to the declination. Shapiro and Aetna denied contact until shortly after the declination. Apart from the question of timing, their versions of the

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[1] From the beginning the Juneau Square developers had been customers of the First Wisconsin National Bank, supplying it with detailed confidential credit information. In numerous instances the First Wisconsin's real estate department used this information in the takeover of Juneau Square.

[2] The memorandum instructed Shapiro to contact Aetna "March 10 or so." (App. 179) Aetna denied the financing by a letter dated March 11. Proof of intent to commit an act constitutes evidence the act was done. I Wigmore, Sec. 102; *Baughman* v. *Cooper-Jarrett, Inc.*, 391 F. Supp. 671 (D.C.W.D.Pa. 1975).

contact were in sharp conflict. Plaintiffs contended that regardless of what caused the declination, Aetna thereafter obstructed their attempts to obtain alternate financing.

Juneau Square Corp. first sought alternate financing from Metropolitan Life Insurance Company of New York. Negotiations were substantially complete in November 1969 when, in a sudden, unexplained about-face, Metropolitan said the deal was dead. When pressed for an explanation Metropolitan gave pro forma reasons which its Milwaukee broker testified were a sham. A First Wisconsin vice president (Liek) was in contact with Metropolitan prior to the declination. Liek claimed he was called by Metropolitan and gave it a routine credit report. Normal business practice, however, prohibits an institutional lender from seeking a credit report from a source in competition with a prospective borrower. Though he denied it, there was also evidence Liek was aware of the First Wisconsin's desire to acquire Juneau Square and Liek's denial he knew of the Metropolitan turndown was flatly contradicted by his fellow officer, Holscher. Holscher also admitted that had the Juneau Square developers obtained financing, the First Wisconsin would not have been able to take over Juneau Square.

A week after the Metropolitan declination Aetna began a mortgage foreclosure action on the existing project based on failure to keep current on real estate taxes.

Juneau Square Corp. had earlier sold a one-half interest in the completed portion of the project (Juneau Square North and South, the so-called "existing project") to defendant Marshall-Michigan. Marshall-Michigan leased its interest back to Juneau Square Corp., which remained in possession and control. As security Juneau

Square Corp. had given Marshall-Michigan a mortgage subordinate to Aetna's.

Marshall-Michigan had always cooperated with the plaintiffs toward completion of the tower office building. When Aetna commenced its action, Marshall-Michigan's principal spokesmen came from New York with a check for $245,000 to cure the default and reinstate the Aetna mortgage. However, when they arrived in Milwaukee, they first met with their attorneys (Foley & Lardner), who also represented the First Wisconsin companies, and then with Holscher of the First Wisconsin. From and after that time, Marshall-Michigan was frequently in contact with the First Wisconsin through their common lawyers and otherwise, turned uncooperative and, as confirmed by the trial court, was "doing its best to eliminate the plaintiffs" (App. 74): Marshall-Michigan did not pay the late taxes; its agent who knew most about the project and was sympathetic to the plaintiffs was fired after 21 years service without explanation; Foley & Lardner on Marshall-Michigan's behalf attempted to pressure the plaintiffs into giving up possession of the project and, without court authorization or warning, sent a letter to the Juneau Square tenants telling them not to pay urgently needed rents to Juneau Square Corp. Shortly after First Wisconsin's executive committee determined to acquire Juneau Square, Marshall-Michigan secretly agreed with Aetna to foreclose its second mortgage, acquire the project and then reinstate the Aetna mortgage.[3] Marshall-Michigan started foreclosure pursuant to this arrangement and sought to have a receiver appointed.

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[3] It later combined this with a sale of its interest in Juneau Square to the First Wisconsin. By this mechanism the First Wisconsin defendants ultimately obtained Juneau Square.

Defendants contended the meeting between the First Wisconsin representatives and Marshall-Michigan preceding these acts was inconclusive and led to nothing. However the evidence established repeated contacts thereafter between Marshall-Michigan and the First Wisconsin, participation by the First Wisconsin in Marshall-Michigan's dealings with Aetna, common attorneys between Marshall-Michigan and the First Wisconsin and a formal decision by the First Wisconsin Corporation's board of directors at its next annual meeting authorizing the acquisition of Juneau Square with special provision to keep the identity of the proposed acquisition secret.

The Milwaukee County circuit judge in the foreclosure action found Marshall-Michigan's letter to tenants to be a wrongful act. He denied Marshall-Michigan's motion for a receiver, leaving Juneau Square Corp. in possession. Aetna and Marshall-Michigan then stipulated to permit construction of the Juneau Square East tower, dismiss their actions and reinstate the Aetna mortgage provided Juneau Square Corp. obtained long term financing by September 30, 1970. In exchange, Juneau Square Corp. waived its foreclosure defenses, counterclaims and right of redemption, so that judgment could be entered if it failed to obtain a financing commitment by the deadline. Juneau Square Corp. did receive a financing commitment but not until shortly after the stipulated deadline had passed. Because Aetna refused to extend the deadline, this financing expired. When it attempted to enter its foreclosure judgment, Aetna met resistance from the judge, who said Juneau Square Corp. could litigate its defenses and counterclaim. Aetna and Marshall-Michigan then agreed to a second stipulation, similar to the first, with a deadline of December 31, 1971.

By May 1971 Juneau Square Corp. negotiated a $14.5 million financing package from New York Life Insurance Company (NYL). NYL's Chicago office forwarded the

financing application to the New York headquarters with a favorable recommendation. At its May 5, 1971 meeting NYL's Mortgage Loan Committee requested certain changes in the structure of the loan package.

First Wisconsin had a friend at NYL (Duncan) who served on this committee. Aware of the First Wisconsin's building development next door to Juneau Square, he asked if he could do some further "credit checking" on the Juneau Square developers. He says within the next day or two he telephoned one Albert Little, a vice president of the First Wisconsin.

Meanwhile, on May 4, 1971 the *lawyers for the First Wisconsin and Marshall-Michigan* had sent a status report on Juneau Square to *Holscher* (the First Wisconsin official in charge of the Juneau Square take over), which on May 6, 1971 Holscher forwarded to the *president* of the First Wisconsin Corporation *and to Little.* (App. 195-7) Little's only connection with Juneau Square at this time was his conveyance to NYL of the credit report referred to below. These lawyers and First Wisconsin officials never explained their joint interest and activity at this time and in these circumstances.

NYL's proposed changes were agreed to by the Juneau Square developers and the NYL field man told them "they had a deal" and that it was "all set". This was confirmed by a contemporaneous letter of the mortgage loan broker. The NYL field man forwarded the application to the home office with a memorandum stating:

> "In summary, we are offered a building with an ideal view overlooking Milwaukee Harbor surrounded by quality type anchored establishments, immediate access to the metropolitan freeway system and a very strong office market in which the subject has already enjoyed a successful penetration. The sponsorship

presently has the necessary balance between expertise and capital to see the project through to successful completion."

Meanwhile, Little of the First Wisconsin gave Duncan of NYL a credit report which painted a very unfavorable picture of another Milwaukee Bank which was participating in the development and accused the Juneau Square developers of mishandling funds on the project. As confirmed by the trial court, that accusation was false.[4]

The Juneau Square financing package was presented to the NYL loan committee for final approval May 19, 1971. NYL declined the loan. A memorandum from NYL's files quotes the NYL committee chairman (Lutz) as specifying the plaintiffs' mishandling of funds and the alleged weakness of the Midland Bank as the reasons for declining the loan (App. 180). Lutz testified this data came from the report given by Little of the First Wisconsin (App. 181-2), although Duncan had not revealed the source of the report to the committee at the May 19th meeting.

When he later learned the First Wisconsin might have been the source for the credit report, Lutz sent a memorandum to his NYL associate, Duncan, chastising him for seeking a report from a prejudiced source and pointing out that the First Wisconsin had ". . . a definite conflict of interest in reporting on their competitor's efforts in building a structure across the street from their proposed building that will come on the leasing market at least a year or more ahead of their building" (App. 185).

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[4] The First Wisconsin originally denied having any contact with New York Life. When the contact was proved by documents discovered in this action, the First Wisconsin gave numerous conflicting explanations to justify the accusation. Each such explanation proved to be untrue and fabricated. See district court's opinion App. 84.

Efforts to revive the NYL financing, eliminating the plaintiffs as developers to remove the stigma created by the First Wisconsin's credit report, proved not feasible.

Juneau Square Corp. thereupon sought financing from a new source, Baird & Warner Real Estate Investment Trust. By mid December 1971 Baird & Warner tentatively agreed to make an equity investment in the project. On December 20, less than two weeks before the stipulated deadline, representatives of Aetna, Baird & Warner, and Juneau Square met to discuss the new financing arrangement. Aetna was willing to withhold entry of the foreclosure judgment provided Marshall-Michigan also did so. Marshall-Michigan initially agreed but following contact from Holscher of the First Wisconsin reneged and entered judgment on January 3, 1972. Aetna followed suit on January 4. The entry of those judgments extinguished any hope that Baird & Warner would finance East.

Marshall-Michigan then purchased the existing project for a nominal amount at the sheriff's sale, subject to Aetna's mortgage. Marshall-Michigan then sold its interest to the defendant Marshall-Wisconsin, a new First Wisconsin subsidiary.[5] Marshall-Wisconsin then secretly agreed with Aetna on a new mortgage arrangement, leaving the First Wisconsin subsidiary, Marshall-Wisconsin, with ownership of the existing project in Juneau Square.

Juneau Square Corp. and investors allied with it still controlled about ¼ of the Juneau Square block—the part not yet developed.[6]. It tried to develop a reduced version

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[5] Marshall-Wisconsin (First Wisconsin) and Marshall-Michigan also had a secret side agreement that if a court should enjoin this sale, they would circumvent the injunction by converting the sale of assets into a sale of stock.

[6] This had not been subject to the Aetna and Marshall-Michigan mortgages. See App. 201.

of the Juneau Square East tower building in this area but could not get financing because of the foreclosure judgments entered against it of over $5 million. The agreement between Aetna and Marshall-Wisconsin (First Wisconsin) described above had provided that their mortgage arrangement would remain unrecorded until the First Wisconsin completed ouster of the Juneau Square developers. This agreement kept Aetna's $5 million deficiency judgment of record, so that Juneau Square Corp. could not obtain credit.

Holscher and Foley & Lardner on behalf of the First Wisconsin then approached Juneau Square Corp.'s president and its lawyer, and offered to relieve them of personal guarantees on a Juneau Square note to the First Wisconsin National Bank, provided they help First Wisconsin acquire the remaining interests in the Juneau Square block held by the lawyer's clients. The lawyer refused, as did Juneau Square Corp.'s president.

The First Wisconsin then purchased some mortgages on the remaining portion of the block and foreclosed, eliminating any further possibility of development. Juneau Square Corp. and its associates thus lost their project and were left heavily in debt. The First Wisconsin companies, on the other hand, were able to develop their office building free of significant competition and lease it at record high rents. The trial court held that competition from Juneau Square East would undoubtedly have altered the First Wisconsin's ability to charge those high rents (App. 72, 80), and that the evidence entitled the jury to find "... that as a result of the elimination of the plaintiffs and the interference with free and open competition, the defendants were able to charge higher rates for the rental of their office space." (App. 80)

At the close of plaintiffs' case in the first trial the court directed a verdict against plaintiffs on their claims under

Section 2 of the Sherman Act and Section 7 of the Clayton Act.[7] The jury returned a verdict finding all defendants except Aetna[8] had conspired to restrain trade unreasonably in the leasing, development, construction, and financing of rental office space in the Milwaukee CBD in violation of Section 1 of the Sherman Act, and awarding damages of $6 million. After trebling and set-off, the court entered judgment for plaintiffs in the amount of $16.5 million.

Defendants, except Aetna, then moved for judgment notwithstanding the verdict or a new trial on all claims. The court granted judgment notwithstanding the verdict on the interstate financing portion of plaintiffs' Sherman Act claims and ordered a new trial on the other claims against each defendant except Aetna (App. 51).[9] The court refused plaintiffs' request for certification of an interlocutory appeal of the new trial order pursuant to 28 U.S.C. § 1292(b). The Court of Appeals then dismissed an attempted appeal by plaintiffs for lack of jurisdiction.

In the second trial much of the same evidence was presented, but with certain important differences in evidentiary and procedural rulings and in the court's instructions:

(a) The plaintiffs were not allowed to cross-examine NYL witnesses with contemporaneous NYL business records to establish that the First Wisconsin's charge of diversion of construction funds was the main cause of NYL's refusal to lend.

(b) Albert Little, who had made the credit report to New York Life, was the only live witness called by the

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[7] Plaintiffs did not appeal the dismissal of their §7 claim.

[8] Aetna's main line of defense had been that it did not *consciously* participate in a conspiracy to restrain trade.

[9] The court denied plaintiffs' motion for a new trial on its claims against Aetna. App. 92-93.

defendants to testify the diversion charge was true. His cross-examination was terminated after a few minutes, at day's end, without effective opportunity to challenge the diversion charge. The court then quashed a subpoena served on Little to return the next day to complete his cross-examination on the grounds the witness would be inconvenienced and uncertainty the witness was subject to subpoena, being a Florida resident (but served right in the courtroom).

(c) The court allowed defendants to edit, shift and exclude deposition testimony of the First Wisconsin official in charge of the Juneau Square credit file during the time the alleged diversion of construction funds referred to in the credit report to NYL supposedly occurred, so as to eliminate contradictions and remove any effective method of demonstrating the invalidity of the witness's several different attempted justifications of the diversion charge.

(d) Deposition testimony by officials of the defendant Marshall-Michigan offered by the plaintiffs at the second trial was severely restricted, as was cross-examination of the witnesses who testified live in behalf of Marshall-Michigan.

(e) Agents of NYL, Baird & Warner and other financing sources were not permitted to quote the reasons they gave the plaintiffs for refusals to finance Juneau Square East. Similarly the principal broker involved in the Metropolitan Life financing (Warren Stringer) was precluded from commenting on the lack of common sense from the business point of view of the reasons given by Metropolitan for its refusal to finance.

(f) The evidence of the total real estate holdings of the First Wisconsin companies and NML in the CBD, offered to show their respective positions in and dominance of the market, was excluded.

(g) Without the required notice to counsel, the court instructed the jury plaintiffs must prove actual injury to competition.

(h) The court declined to give instructions requested by plaintiffs regarding the illegality of certain acts done by defendants and instead instructed that any such illegality is irrelevant.

i) The court again declined to instruct that defendants' conduct could be a per se violation of §1 of the Sherman Act.

(k) The court instructed that Aetna could not be found to be a co-conspirator and forbade plaintiffs to attempt to prove or argue that Aetna's actions had been at least controlled or manipulated by the other defendants.

(l) At the close of the case the court also struck all evidence and precluded any claim in argument tending to show Aetna's March 11, 1969 refusal to finance Juneau Square East was due to any conspiracy among the other defendants.

(m) Consistently throughout the second trial, the court applied strict standards to the plaintiffs but very liberal standards to the defendants in such matters as the scope and vigor of cross-examination permitted, the foundation required for business records, and the imposition of time limits for questioning witnesses and for jury argument. The court also permitted two defense counsel to cross-examine one of plaintiffs' principal witnesses in shifts and permitted the presentation of plaintiffs' direct case to be interrupted for long periods of alleged "voir dire" of witnesses.

The second trial concluded on June 19, 1978 with a jury verdict for defendants on all issues. Plaintiffs moved for a new trial, which the district court denied. Plaintiffs then appealed to the Circuit Court of Appeals for the Seventh Circuit which affirmed the trial court in all respects.

ARGUMENT

I.

THE NEW TRIAL ORDER OF THE DISTRICT COURT AND ITS AFFIRMANCE BY THE COURT OF APPEALS RESULTED FROM A SERIES OF FUNDAMENTAL ERRORS WHICH DESERVE REVIEW BY THIS COURT.

A. The district court applied an erroneous and unconstitutional "weight of the evidence" standard in setting aside the first verdict.

This Court has not yet defined the "weight of the evidence" standard for deciding a motion for a new trial. The conflict among the circuits as to this standard is described in 11 Wright & Miller, Federal Practice and Procedure, §2806, p. 42:

> The power of a federal judge to grant a new trial on the ground that the verdict was against the weight of the evidence is clear. The standard that is to control in passing on motions of this kind is not.

Notwithstanding uncertainty on the standard, there is general condemnation of what the district court here did: substitution of its view of the evidence for that of the jury.

In its new trial decision (App. 51), the district court omitted much important evidence, mistook other evidence, and accepted testimony from defense witnesses the jury had every right to disbelieve. When plaintiffs cited these errors in their application for an interlocutory appeal under 28 U.S.C. 1292(b), the district court responded (App. 102):

> The Court's prior opinion *adopts a view of the case based on the evidence presented at trial.* The plaintiffs have not argued to the contrary.[10] The fact that the plaintiffs do not agree with the characterization or that the jury *was not required to adopt it* cannot serve as a basis for this Court to certify its order for appeal. (Emphasis added.)

The Court went on to say (App. 103):

> As to the view of the evidence adopted by the Court, it is supported by substantial evidence in the record.

The Seventh Amendment prohibits re-examination of any "fact tried by a jury . . . (other) than according to the rules of the common law." A trial judge should not interfere with the verdict unless the jury has reached a seriously erroneous result. 6A Moore's *Federal Practice,* para. 59.08(5) at 59-160; 11 Wright & Miller, *Federal Procedure and Practice,* Sec. 2806 at 49. A jury verdict should not be set aside if it is one which could reasonably have been reached or unless it is "clearly, decidedly, and overwhelmingly against the weight of the evidence." *Schybinger* v. *Interlake Steamship Company,* 273 F.2d 307, 312 (7 Cir. 1959); *Duncan* v. *Duncan,* 377 F.2d 49, 52 (6 Cir. 1967); *Champion Home Builders* v. *Shumate,* 388 F.2d 806, 808 (10 Cir. 1967).

The district court here found:

> . . . the Court has carefully weighed the evidence and is of the opinion that there is sufficient evidence to support the finding of the jury [that the conspiracy existed]. (App. 72).

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[10] Plaintiffs' 1292(b) brief having argued strongly against the view of the evidence taken by the trial court, we do not understand the court making this statement.

Instead of honoring the jury's finding, the court substituted its own view of the evidence and decided that since its view was "based on evidence presented at the trial" and since the jury's verdict was inconsistent with the court's view, the verdict was set aside. This was an erroneous and unconstitutional misapplication of the "weight of the evidence" doctrine. *Tennant* v. *Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944) states:

> Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

It is beside the point that the trial court's view may be "supported by substantial evidence." It is the jury's view that prevails where, as here, it is supported by the evidence.

B. The court of appeals failed to review the district court's "weight of the evidence" test and improper use of a supposed instructural error as grounds for the new trial.[11]

The court of appeals relied on an amalgam of the district court's "weight of the evidence" analysis and hearsay rulings to affirm the new trial order. It failed entirely to consider whether, in ordering a new trial, the district court acted under compulsion of an improper "weight of the evidence" test, which is as reviewable as any other legal error. 6A Moore Federal Practice §59.08 [5] at 59-154. The implicit sanctioning of the district court's erroneous weight of the evidence test conflicts with the Seventh

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[11] These questions were specifically presented and briefed in the court below. App. 253-289.

Circuit's own earlier decisions as well as those of most other circuits. *Durant* v. *Surety Homes Corp.*, 582 F.2d 1081, 1087 (7th Cir. 1978), and *Schybinger, Duncan* and *Champion Home Builders, supra.*

Similarly the court of appeals sanctioned the district court's violation of F.R.Civ.P. 59(d). The district court held a supposed failure correctly to instruct on public injury ". . . was taken into consideration in ruling on the motions for a new trial." (App. 80, n. 16) In fact, the instruction given was what defendants requested, there was no request to satisfy F.R.Civ.P. Rule 51, and the supposed error was not included in the defendants' ground for a new trial. At a *minimum,* therefore, the trial court was required by F.R.Civ.P. 59(d) to give plaintiffs a hearing before granting a new trial, which it did not do, so that the new trial order was jurisdictionally invalid. *Lapiczak* v. *Zaist,* 451 F.2d 79, 80 (2 Cir. 1971) and *United States* v. *Robinson,* 361 U.S. 220, 229 (1960).

C. The scope of appellate review for an order granting a new trial should be broader than the scope of review for an order denying a new trial.

This Court has not yet decided whether the scope of appellate review for an order granting a new trial should be the same as for review of an order denying a new trial. The distinction is forcefully set forth in *Massey* v. *Gulf Oil Corporation,* 508 F.2d 92, 94-95 (5th Cir. 1975):

> Our review of an order granting a motion for new trial is somewhat broader than review of an order denying a motion for new trial.
>
> • • •
>
> We noted that where the judge denies the motion and leaves undisturbed the jury's determination, all factors press in the direction of leaving the trial judge's

> ruling undisturbed. But where the judge has granted a new trial the factors oppose each other. Deference to the trial judge is subjected to opposing tensions of deference to the jury as the body to whom fact finding is constitutionally allocated and deference to the decision which the jury has reached pursuant to that authority. Furthermore, where a new trial is granted on the ground that the verdict is against the weight of the evidence, we exercise closer scrutiny than where the ground is that some undesirable or pernicious influence has intruded into the trial, because to an extent the judge has substituted his judgment of the facts and credibility of witnesses for that of the jury. Thereby we protect the litigants' right to jury trial.

The Seventh Circuit made no such distinction. It described its review as "exceedingly limited" because of the trial court's "broad discretion," relying on three cases affirming *denials* of new trial motions (App. 13).

By erroneously applying to grants of a new trial the same scope of appellate review as denials of a new trial, the Seventh Circuit put itself in conflict not only with the Fifth Circuit (*Massey*), but also with an authority cited earlier in its own decision. 11 Wright & Miller, Id., §2819.

D. The court of appeals decision contains numerous clear errors on matters essential to its result.

The court of appeals affirmance of the new trial order rests upon two hearsay rulings which, though "hardly sufficient" to warrant a new trial standing alone (App. 19), became prejudicial because the hearsay (some Moertl testimony and a Lutz memorandum) was supposedly "the only evidence of the causal relationship" between Little's credit report and New York Life's declination of financing. (App. 20)

The court plainly erred. Plaintiffs' *principal* evidence of causation was *another* contemporaneous memorandum (App. 180) and related Lutz testimony (App. 181-2), properly in evidence and clearly establishing the reason for the NYL declination was the data set forth in the Little credit report.[12] There was extensive additional evidence showing the causal relationship, summarized at (App. .....).

It was also clear error to hold that ". . . plaintiffs' theory . . . reduced itself to reliance upon the [Little/NYL sequence]." There were *seven* financing negotiations interfered with by the First Wisconsin: Aetna, Metropolitan, Marshall-Michigan, Diversified, New York Life, Baird & Warner REIT and Northwestern Elevator Co. (App. 261-289). In one case (Marshall-Michigan) the direct product of the First Wisconsin's contact was the continuation of Aetna's foreclosure action and the commencement of Marshall-Michigan's foreclosure action. This self-evidently impaired Juneau Square Corp.'s ability to obtain financing.

Finally the abundant evidence of the First Wisconsin's conspiratorial pattern of behavior and motive to interfere with financing meant the plaintiffs had only to establish opportunity (i.e., the fact of contact) to make their case. *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969); *United States* v. *Grzywacz*, 603 F.2d 688 (7th Cir. 1979); *Poller* v. *Columbia Broadcasting*

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[12] The court's reference to the "alleged" impropriety of the Little credit report (App. 19) suggests it overlooked the fact that the report's central accusation (that the Juneau Square Developers had misused construction funds) was shown by the overwhelming weight of the evidence to be a slander. See trial court's opinion at App. 84. The court of appeals' description of the report leaves out that central accusation (App. 9-10), despite the fact that most of the First Wisconsin's defense was a futile attempt to justify the accusation.

System, Inc., 396 U.S. 464, 473 (1962); *Interstate Circuit Inc.* v. *United States*, 306 U.S. 208 (1939).

This Court should therefore review the trial court's new trial order and the court of appeals' affirmance thereof.

II.

THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS IN HOLDING THAT THE PLAINTIFF IN A PRIVATE ANTITRUST ACTION UNDER SECTION 1 OF THE SHERMAN ACT MUST PROVE ACTUAL INJURY TO COMPETITION.

Over plaintiffs' objection the district court instructed the jury in the second trial:

> The antitrust laws were enacted for the protection of competition, not competitors. The plaintiffs must, therefore, establish that the defendants' acts injured not only the plaintiffs themselves, but competition in the leasing of office rental space in the central business district of the City of Milwaukee. (App. 23).

The court of appeals held such instruction was proper. (App. 23-24).

The instruction is contrary to this Court's decisions in *Radiant Burners, Inc.* v. *People's Gas Light & Coke Co.*, 364 U.S. 656 (1961), *In re McConnell*, 370 U.S. 230 (1962) and in *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964). It is also contrary to the decision of the Second Circuit in *Syracuse Broadcasting Corp.* v. *Newhouse*, 295 F.2d 269, 276-277 (2 Cir. 1961), and to an earlier Seventh Circuit case, *Switzer Brothers, Inc.* v. *Locklin*, 297 F.2d 39, 47 (7 Cir. 1961), *cert. den.* 369 U.S. 851 (1962).

The court below attempted to limit these cases to per se violations. (App. 24). No such limitation is found in the decisions of this Court. *Radiant Burners* states at 660:

> Therefore, to state a claim upon which relief can be granted under that section (Sec. 1 of the Sherman Act), allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires.

In re McConnell held at 231, " . . . the right of recovery of a plaintiff in a treble damage antitrust case does not depend on proving an economic injury to the public."

Assuming application of the rule of reason were proper, the district court correctly instructed plaintiffs must show an unreasonable restraint of trade, defined as one which "tends or is reasonably calculated to prejudice the public interest" in free and open competition. (App. 22-23).

The Court of Appeals unfairly and inaccurately treated this language as "clarifying" the method by which plaintiffs might meet their burden of proving actual injury to competition. (App. 22). Not only is there no such burden; the instruction did not say or imply that the burden to prove actual injury to competition is satisfied by proof of an unreasonable tendency or purpose to impair competition.

The Court of Appeals' attempted rationalization, coupled with its suggestion that had the instruction not been "clarified" it might have reversed (App. 22), emphasize the confusion and uncertainty in this area that call for review by this Court.

III.

THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS IN HOLDING THAT THE USE OF UNFAIR MEANS BY ONE MAJOR COMPETITOR TO DESTROY ANOTHER IS ILLEGAL PER SE WHEN DONE FOR THE PURPOSE OF DESTROYING COMPETITION.

The First Wisconsin defendants were the largest owners and operators of rental office space in the Milwaukee CBD. The plaintiffs' Juneau Square project, if completed, would have been the second largest. The Court of Appeals noted the probable effect the completion of the plaintiffs' office project would have had upon the defendants own development plans and concluded, "This obvious competitive pressure is the setting for plaintiffs' antitrust claims." (App. 4). Defendants aimed to and did destroy the plaintiffs by direct and improper means, primarily through interference with financing plaintiffs needed to survive.

The Court of Appeals inaccurately perceived the plaintiffs' request that the jury be given the option to find a per se violation as an attempt to incorporate the general law of unfair competition. (App. 27-28). However, this case does not involve "unfair competition" in the usual sense. Defendants weren't trying to unfairly compete with the plaintiffs. They were trying to remove them from the market so they wouldn't have to compete with them.

The classic description of per se violations of Section 1 of the Sherman Act describes the defendants' conduct here:

> However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they

> have caused or the business exuse for their use. *Northern Pac. R. Co.* v. *United States*, 356 1, 5 (1958).

Application of the per se rule here is reinforced by *United States* v. *General Motors*, 384 U.S. 127, 148 (1966):

> The protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws. We cannot respect that solicitude by closing our eyes to the effect upon price competition of the removal from the market, by combination or conspiracy, of a class of traders. Nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely.

In no circumstances can a direct attack by one major competitor upon another resulting of the loss of a substantial participant in the market be anything but an unreasonable restraint of trade.

The First Circuit follows the rule that use of unfair means by one major competitor to destroy another is illegal per se under Section 1 of the Sherman Act. *Atlantic Heel Co.* v. *Allied Heel Co.*, 284 F.2d 879, 884 (1 Cir. 1960); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547, 562 (1 Cir. 1974). The Tenth Circuit appears to agree. *Craig* v. *Sun Oil Company of Pennsylvania*, 515 F.2d 221, 224 (10 Cir. 1975); *Perryton Wholesale, Inc.* v. *Pioneer Distributing Co.*, 353 F.2d 618 (10 Cir. 1965), cert. denied 383 U.S. 945 (1966). The contrary position has been taken in the Fifth Circuit. See *Northwest Power Products, Inc.* v. *Omark Industries*, 576 F.2d 83, 90 (5 Cir. 1978).

Defendants here engaged in a restraint of trade far more vicious and direct in its anti-competitive effect than price fixing, group boycotts, territorial divisions or tying arrangements, and do not deserve the benefit of the rule

of reason. So long as the conduct is not divorced from an anticompetitive purpose, it is clearly appropriate for per se treatment.

IV.

THIS COURT'S POWER OF SUPERVISION IS CALLED FOR BECAUSE THE COURT OF APPEALS SANCTIONED RADICAL DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURES BY THE DISTRICT COURT IN AWARDING A NEW TRIAL ON INSUBSTANTIAL AND SPECULATIVE GROUNDS AND THROUGH PERVASIVE ERROR WHICH DEPRIVED PLAINTIFF OF A FAIR HEARING IN THE SECOND TRIAL.

In addition to the grounds already discussed the trial court set aside the first verdict on the speculative grounds that: (a) the jury *may* have been influenced by an alleged "imbalance of time" in the presentation of the plaintiffs' and defendants' cases (defendants made no record of possible prejudice) (App. 89); (b) the jury *may* have been confused by the complexity of the evidence (there is no record such confusion existed) (App. 90); (c) the jury *may* have duplicated damages among the several plaintiffs (damages were waived by all plaintiffs but one to avoid this) (App. 90-91); (d) "possible" (but not *found*) jury misconduct (App. 92); and (e) that the jury *may* have been influenced by "colorful" jury argument (App. 92).

As is apparent, these factors were based on unfounded speculation. This Court held in *Opper* v. *United States*, 348 U.S. 84, 95 (1954):

> "To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of the jury to follow instructions."

The Court of Appeals should not be permitted to sanction the use of such ephemeral and speculative grounds to set aside a jury verdict, particularly after so protracted and expensive a trial. To do so is not only grossly unfair to the parties but imposes needless burdens on the judicial system. This Court's supervisory power should be brought to bear to prevent this from recurring.

In the second trial the district court engaged in numerous serious departures from proper judicial procedures which the Court of Appeals brushed aside without explanation as lacking merit. (App. 30). The departures were of fundamental importance and prevented the plaintiffs from having a fair trial. They included (a) deprivation of the right to cross-examine a key defense witness (Albert Little) on a key issue in the case (the falsity of his credit report to New York Life) by quashing without cause a subpoena served upon the witness to permit cross examination (See details at App. .....); (b) permitting arbitrary and misleading editing and rearrangment of deposition testimony (App. .....); (c) permitting lengthy interruption of plaintiffs' case by allowing defendants to conduct nearly four days of alleged "voir dire" of witnesses (App. .....); and (d) markedly uneven and unfair application of evidentiary and time restrictions on plaintiffs as compared with defendants (App. .....). See generally App. ..... to .....

The district court also declined to instruct as to the legality of various acts of the defendants, to be considered on the issues of motive, intent and reasonableness if the jury found they were done as part of a conspiracy to restrain trade. See *Utah Pie Co.* v. *Continental Baking*, 386 U.S. 685, 696-7 (1967); *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). The district court thus failed in its fundamental duty to tell the jury what is legally improper so that it could weigh the conduct in question on the relevant issues.

The cumulative effect of these procedural aberrations, which the court of appeals has sanctioned, clearly caused a miscarriage of justice in the second trial. They too call for this court's supervisory attention, lest such practices erode the possibility of a fair trial.

V.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THIS COURT IN REQUIRING PLAINTIFFS TO ESTABLISH DEFENDANTS' EXACT MARKET SHARE TO AVOID A DIRECTED VERDICT ON THE ISSUE OF ATTEMPT TO MONOPOLIZE EVEN THOUGH THERE WAS DIRECT EVIDENCE FOUND BY THE TRIAL COURT FROM WHICH THE JURY COULD FIND THE DEFENDANTS HAD AND WERE EXERCISING POWER TO FIX PRICES OR EXCLUDE COMPETITION.

The district court granted a directed verdict against plaintiffs on the issue of attempt to monopolize. (App. 31). The court of appeals affirmed on the ground plaintiffs had failed to establish defendants' market share. (App. 30).

This Court rejected the "numbers approach" to determination of monopoly power in *United States* v. *Columbia Steel Co.*, 344 U.S. 495, 527-528 (1948).

Plaintiffs did in fact introduce substantial statistical evidence of defendants' market power (about 70% of the market), summarized at App. ..... More important, plaintiffs introduced more direct evidence of monopoly power: proof that defendants were in fact fixing prices and excluding competition in the market. The trial court acknowledged monopoly power can be proved by such direct evidence and that only when such direct evidence is lacking is the thorough economic evaluation and weighing of relative market strengths called for. (App. 45.) The trial court then became confused, however, and rejected plaintiffs' claim for failure to make the full economic evalua-

tion even though it had in effect found there was direct evidence of monopoly power: ". . . that as a result of the elimination of the plaintiffs and the interference with free and open competition, the defendants were able to charge higher rates for the rental of their office space" (App. 80) and that competition from Juneau Square would undoubtedly have altered First Wisconsin's ability to charge those high rents. (App. 72, 80.)

In *Kearney & Trecker Corp.* v. *Giddings & Lewis, Inc.*, 452 F.2d 579, 598 (7 Cir. 1971), *cert. denied* 405 U.S. 1066 (1972), the court said:

> [W]e do not understand the "dangerous probability" test to involve an evaluation of the actual likelihood that an attempt would have succeeded. . . . Rather, it requires an *appraisal of the alleged offender's ability to achieve the forbidden result,* his intent, and the nature of his overt actions. . . . The ultimate concern is the firm's actual or threatened impact on competition in the relevant market. (Emphasis supplied.)

In this case, the district court found, in effect, that there was evidence from which the jury could find that defendants were in fact in the very process of achieving the forbidden result, thus clearly demonstrating at least a dangerous probability of success. It was thus a plain violation of this Court's ruling in *Columbia Steel* to take this issue from the jury for want of secondary evidence of defendants' power.

CONCLUSION

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the Court of Appeals for the reasons given in this petition.

Respectfully submitted,

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Supreme Court, U. S.
FILED
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No. 80-517

In the Supreme Court of the United States

OCTOBER TERM, 1980

JUNEAU SQUARE CORP., et al.,
Petitioners,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, et al.,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the
Supreme Court of the United States

OCTOBER TERM, 1980

NO.

JUNEAU SQUARE CORP., et al.,

Petitioners,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 79-2037

JUNEAU SQUARE CORP., *et al.*,

Plaintiffs-Appellants,

v.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 72-C-533—Robert W. Warren, *Judge.*

ARGUED FEBRUARY 25, 1980—DECIDED JULY 3, 1980

Before SPRECHER and WOOD, *Circuit Judges*, and BUA, *District Judge.**

WOOD, *Circuit Judge.* The civil antitrust action before us has its origins in the development, or more aptly, non-development of a portion of the City of Milwaukee's beautiful lakeshore skyline. Plaintiffs were developers of a major office building complex, known as Juneau Square, located on prime lakefront property in that city's central business district (CBD). Defendant First Wisconsin Corporation (First Wisconsin), a national bank holding company, is the parent of defendants First Wisconsin National bank of Milwaukee (First Wisconsin National Bank), First

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* The Honorable Nicholas J. Bua, United States District Judge for the Northern District of Illinois, is sitting by designation.

Wisconsin Development Corporation (a corporation formed to develop First Wisconsin Center, the CBD's largest office building), and Marshall-Wisconsin Company (Marshall-Wisconsin) (a corporation formed to acquire and operate Juneau Square). Defendant Marshall-Michigan Company (Marshall-Michigan) is a Netherlands Antilles corporation formed as a vehicle for foreign national investment in Juneau Square. Defendant Aetna Life Insurance Company (Aetna) was a long-term mortgage lender for a part of the Juneau Square project.

I.

The factual background of this case is set forth in extensive detail at 435 F. Supp. 1307 (E.D. Wis. 1977). We adopt that statement of facts to the extent consistent with this opinion and summarize below only those facts necessary for disposition of this appeal.

In the early 1960's Wil-Ten Company (Wil-Ten) purchased property along the Lake Michigan shore in downtown Milwaukee. In 1962 Wil-Ten conveyed that property to plaintiff Juneau Square Corporation (the Corporation) its wholly-owned subsidiary. The Corporation then constructed a three-story office building, Juneau Square South (South), on the property with construction financing provided by First Wisconsin National Bank. Aetna, the building's major tenant, provided permanent financing secured by a first mortgage on the property.

In 1964 the Corporation commenced construction of a nine-story office building, Juneau Square North (North), on the same property immediately adjacent to South. Another bank, not a party to this suit, provided construction financing, and Aetna increased its loan to the Corporation to provide permanent financing. Shortly thereafter, the Corporation encountered financial difficulties,

which culminated in 1966 with the sale of part of its interest in the project. Marshall-Michigan purchased an undivided one-half interest, and a number of individual investors purchased undivided interests totalling twenty-five percent. Marshall-Michigan and the individuals immediately leased-back their interests to the Corporation, which allowed the Corporation to retain operational control of the project. As security for the obligation to pay the rent stipulated in the lease-back agreement, Marshall-Michigan received a second mortgage, subordinate to Aetna's first mortgage, on the entire project. Unfortunately, the Corporation's financial difficulties continued despite these measures.

As North and South neared completion in 1967, the Corporation began preparing for construction of the final and most ambitionus phase of the project, Juneau Square East (East), a high-rise office tower. The Corporation's assets and cash flow, however, were insufficient to complete improvements on North and South that had been promised to tenants and to begin construction of East. Aetna provided some help by agreeing to a moratorium on principal payments under its mortgage loan on North and South. Planning of East then proceeded, but by early 1969, the Corporation fell into default under the Aetna and Marshall-Michigan mortgages because of its failure to pay $245,000 in real estate taxes. At this point, the Corporation began its search for additional financing.

While the Corporation encountered these financial difficulties, First Wisconsin formulated plans to construct a new corporate headquarters (First Wisconsin Center) adjacent to the Juneau Square site. The First Wisconsin project contemplated placing approximately one million square feet of prime new office space on the CBD market. East was scheduled for completion one year earlier than

First Wisconsin Center and would have added 300,000 square feet of new office space in the CBD. Market studies indicated that the CBD could absorb only 200,000 square feet of new office space annually. This obvious competitive pressure is the setting for plaintiffs' antitrust claims.

In late 1968 Richard Holscher, the officer responsible for developing First Wisconsin Center, began securing land upon which to build the office tower. Holscher negotiated an agreement with Northwestern Mutual Life Insurance Company (NML) to transfer a parcel of land to First Wisconsin and to act as First Wisconsin's agent in the acquisition of additional land for possible later expansion. NML apparently had been planning to build a 100,000 square foot office building in the CBD to open about the same time as First Wisconsin Center but, as part of the agreement, shelved those plans for five years. This allowed First Wisconsin to lease its Center without Competition from NML.[1]

A few months later, Holscher met with one of First Wisconsin's attorneys, David Shute of the Milwaukee law firm of Foley & Lardner. At that meeting, Holscher and Shute apparently discussed plans for the acquisition by First Wisconsin of the Juneau Square project. After-

[1] The agreement with NML notwithstanding, First Wisconsin Center faced significant potential competition from East, which offered earlier occupancy and a more desirable location enhanced by an unobstructed view of Lake Michigan. In addition, the East site was attractive as an additional parcel, adjacent to the NML parcel, for possible later expansion of First Wisconsin Center. Incident to his investigation of possible expansion sites, Holscher reviewed the credit files maintained at First Wisconsin National Bank on the Corporation and Wil-Ten, both of whom were customers. Plaintiffs urged that Holscher's interest stemmed from a desire to eliminate the potential competition that development of East likely would bring. Plaintiffs further urged that Holscher's peek into the confidential credit files was one of many unfair methods of competition that comprised the unlawful conspiracy.

wards, Shute sent a handwritten memorandum to Chicago attorney Harold Shapiro, which contained confidential information gleaned from First Wisconsin's credit files, instructing Shapiro to explore with Aetna its interest in selling its mortgage on North and South.[2] Shute also instructed Shapiro not to disclose to Aetna that First Wisconsin was his principal. Shapiro, acting for his blind principal, met with Aetna representatives on March 18, 1969, but failed to evoke any interest for the proposition. Almost simultaneously, the Corporation sought to persuade Aetna to finance East, but on March 11, 1969, one week *before* the Shapiro visit, Aetna informed the Corporation that it would not provide that financing.

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[2] The Shute-Shapiro memorandum reads in pertinent part:

5. We have reason to believe Aetna might like out of the situation—

a. low rate

b. shaky financial history project & its developers We understand developers have been trying to raise funds for new project from various sources, and they are apparently down to Aetna & will be filing application next week for loan for "East" project . . .

* * * *

6. Our strategy:

a. As representatives of interested undisclosed prin., contact Aetna for prelim. discussions. We believe best contact wd. be ____ Swinehart, who once held title of V.P. in charge of Mgages. Might start with him, see where he leads you.

* * * *

b. Our client's int. is to purchase entire block for cash. Our knowledge of details of deal, as disclosed to Aetna, shd. be limited to what we might have been able to find out w/o "insider" info (will leave to your good judgment). We would pay fair *cash* price equal to market value.

Having lost Aetna, the Corporation found it necessary to seek financing elsewhere. In the summer of 1969 the Corporation entered negotiations with Metropolitan Life Insurance Company of New York (Metropolitan). The negotiations, however, became snagged when Aetna refused to release from its mortgage some land essential to the construction of East. The parties reached an accommodation, however, when Aetna agreed to provide necessary and appropriate air rights and easements. By the beginning of November 1969 workups and investigations incident to the Metropolitan financing package were substantially complete, and Metropolitan requested that representatives of the Corporation travel to New York on November 5, 1969 to complete the financing package subject to Aetna's conveyance of the air rights and easements. Immediately before that meeting, in a sudden about-face, Metropolitan informed its Milwaukee representative, Warren Stringer, that the deal was dead. Stringer relayed that information to a representative of the Corporation who called Metropolitan for an explanation. Metropolitan remained silent until a week later when it sent a letter to the Corporation listing its reasons for canceling the deal. In that letter, Metropolitan informed the Corporation that a generally unfavorable market and the availability of more attractive investment opportunities were behind its declination.

During the negotiations that culminated in its decision not to finance East, Metropolitan contacted James Liek, a First Wisconsin National Bank employee, seeking his opinion of the financial stability of the Juneau Square project and its developers. Liek testified he told Metropolitan that the Juneau Square property was prime quality but that the Corporation had encountered problems developing North and South and had an overdue loan outstanding at First Wisconsin National Bank. Further, Liek

indicated he was unaware of any interest First Wisconsin might have had in acquiring the project at that time.[3]

On November 13, 1969 one week after Metropolitan bowed out, Aetna began a foreclosure action against the Corporation based on its failure to pay real estate taxes. When Marshall-Michigan learned of the foreclosure, its New York-based representative, John Sann, traveled to Milwaukee with a $245,000 check payable to Aetna to cure the default and reinstate the mortgage. Upon arrival in Milwaukee, Sann met with Marshall-Michigan's local counsel, Robert Bradley of Foley & Lardner, and Richard Holscher of First Wisconsin. As noted, Foley & Lardner also served as counsel to First Wisconsin. Consequently, Bradley was aware that First Wisconsin was interested in acquiring Juneau Square and so advised Sann. Sann then inquired of Holscher whether First Wisconsin would be interested in acquiring Marshall-Michigan's interest in the project, which at that time was subject to Aetna's foreclosure action. Holscher declined assertedly because First Wisconsin was not interested in buying a lawsuit. Holscher, however, indicated First Wisconsin might be interested in acquiring the project upon satisfactory resolution of the foreclosure action.

Amid growing concern about the Corporation's possible diversion of funds from North and South revenues for development of East, Marshall-Michigan sent letters to each North and South tenant directing that rental pay-

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[3] Although Liek claimed he first became aware of First Wisconsin's desire to acquire Juneau Square in May 1971, the formal minutes of a meeting of the First Wisconsin executive committee record Liek as present when the body granted authority to acquire Juneau Square. Liek appeared at that meeting to report on matters unrelated to Juneau Square. Apparently, it was not unusual at such meetings for nonmembers reporting on specific matters to leave the meeting room at the conclusion of the report.

ments be deposited in a special escrow account.[4] At about the same time, Sann also persuaded Aetna to delay its foreclosure action for a time sufficient to permit Marshall-Michigan to gain control of the project. Marshall-Michigan then commenced a foreclosure action on its second mortgage, but the Circuit Court of Milwaukee County refused to appoint a receiver. Aetna then declared void its promise to delay foreclosure and proceeded.[5]

Upon the collapse of the Aetna/Marshall-Michigan agreement, the Corporation began negotiations in both foreclosure actions, which culminated in Aetna's and Mar-

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[4] Since Marshall-Michigan held interests in North and South only, diversion of revenues to East was at its expense.

[5] Plaintiffs argue that the foregoing supports the inference that Marshall-Michigan joined the conspiracy at this point. The district court explains:

> This inference was based on the following circumstances. Prior to the commencement of the Aetna foreclosure action, Marshall-Michigan had cooperated with the plaintiffs in the development of the project. When Sann and Clark came to Milwaukee their intention was to cure the tax default and reinstate the mortgage. After conferring with local counsel, a meeting was arranged with the First Wisconsin defendants. As a result of this meeting and the subsequent attempts of Marshall-Michigan to acquire control of the project set forth above, the jury was asked to infer that Marshall-Michigan joined the conspiracy in order to salvage its investment interest in the project. Knowledge of the conspiracy in restraint of trade is imputed to Marshall-Michigan because of the fact that both Marshall-Michigan and the First Wisconsin defendants were represented by the same law firm; they presumably were both fully advised of the situation before reaching agreement and Marshall-Michigan was in any event presumably aware of the competitive position of the plaintiffs and the First Wisconsin defendants.

435 F. Supp. at 1314.

shall-Michigan's stipulations that they would grant air rights and easements necessary for construction of East and reinstate Aetna's mortgage on North and South provided the Corporation secured financing by September 30, 1970. In exchange, the Corporation waived its foreclosure defenses and right of redemption and agreed that Aetna and Marshall-Michigan could enter judgment against the Corporation if the deadline passed without the acquisition of financing. When the Corporation failed to meet the deadline, Aetna sought entry of judgment pursuant to the stipulation. However, when Aetna met resistance from the presiding county judge, Aetna and the Corporation entered into a second stipulation, which set December 31, 1971 as the new deadline for securing financing.

The next avenue of exploration for the Corporation in its quest for financing was the New York Life Insurance Company (New York Life). In due course, New York Life's Chicago office forwarded the Corporation's application for financing with a favorable recommendation to its New York headquarters. On May 5, 1971, New York Life's Real Estate and Mortgage Loan Committee considered whether to grant initial approval for the loan. Some question arose at the meeting regarding one of the banks involved in the financing, Midland National Bank (Midland). The committee, therefore, took no action, instead directing Frederick Duncan, New York Life's treasurer, to investigate Midland's financial strength. Duncan contacted Albert Little of First Wisconsin National Bank and requested that he do a credit check on Midland. Little examined First Wisconsin National Bank's credit files on Midland and informed Duncan's office of his findings a few days later. The New York Life employee who spoke with Little memorialized the substance of that conversation in a contemporaneous memorandum that indicated

Little had told him that Juneau Square was underfinanced and that Midland was a reasonably stable but small bank that might be biting off more than it could chew.[6] On May 19, 1971, the committee once again considered and, on a vote of five to one, rejected the application.[7]

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[6] The memorandum reads in pertinent part:

> We were told that the property has been developed in installments and was "bootstrapped all the way." They have a high debt. It was believed that the mortgage held by . . . Aetna was in trouble and the lender has agreed to defer foreclosure. Our source bank had a part in the construction lending and found proceeds were not being used as indicated. There appeared to be several recent judgments and liens against the property.
>
> It was our source's opinion that the entire project was not adequately financed. Recent high interest rates gave them real problems.
>
> The Midland National Bank was described as a retail oriented institution that has made reasonable progress. They took over a bank a short while ago and this accounts for a jump in deposits from $60 million to $100 million. The bank's President, Mr. Kelly, was described as a very aggressive banker who was not well liked in the local financial community. He had been with the Marine Bank where he led a proxy fight to get control of the corporation that was largely owned by interests close to the bank for which he was working.

[7] The minutes of the meeting indicate that the reason for the rejection was the concern that Midland was unqualified to coordinate such a large, complex financial transaction. There was some evidence, namely a subsequent New York Life memorandum, that the integrity of the Corporation was a factor. That memorandum reads in pertinent part:

> Mr. Lutz [chairman of the loan committee] indicated:
>
> 1. Sponsors had mis-handled funds and were being foreclosed.
>
> 2. Bank was not sufficiently capitalized to handle gap funds.

At this point, the Corporation sought financing from a new source, the Baird & Warner Real Estate Investment Trust (Baird & Warner). By mid-December 1971 Baird & Warner tentatively agreed to make an equity investment in the project. On December 20, less than two weeks before the stipulated deadline, representatives of Aetna, Baird & Warner, and the Corporation met to discuss the new financing arrangement. Aetna apparently expressed a willingness to accommodate the arrangement by withholding entry of the foreclosure judgment provided Marshall-Michigan also did so. Marshall-Michigan initially agreed but then reneged and entered judgment on January 3, 1972. Aetna followed suit on January 4. The entry of those judgments marked the extinguishment of any hope the Corporation had that Baird & Warner would finance East.

Marshall-Michigan, on February 28, 1972, purchased the project for a nominal amount, subject to Aetna's mortgage, at a sheriff's sale. Shortly thereafter, Marshall-Michigan sold its interest to Marshall-Wisconsin, a First Wisconsin subsidiary. Marshall-Wisconsin then reached agreement with Aetna, establishing a new mortgagor-mortgagee relationship and leaving First Wisconsin in control of Juneau Square. Later that year, plaintiffs filed a civil antitrust action seeking treble damages under section four of the Clayton Act, 15 U.S.C. § 15, on their claims that defendants violated sections one and two of the Sherman Act, 15 U.S.C. §§1, 2, and section seven of the Clayton Act, 15 U.S.C. § 18.[8] Trial began on May 3, 1976 before Judge Warren, who has presided over this case throughout its long life. At the close of plaintiffs' case, the court, on motion of defendants, entered a directed verdict against plaintiffs on their claims under section two of the Sherman Act. On October 1, 1976, the jury returned a verdict on the remaining claims, finding that all defendants except Aetna had conspired to restrain trade unreasonably in the

[8] Plaintiffs did not appeal the pretrial dismissal of their §7 claim.

leasing, development, construction, and financing of rental office space in the Milwaukee CBD in violation of section one of the Sherman Act, and awarding damages of $6 million. After trebling and set-off, the court entered judgment in the amount of $16.5 million. Defendants, except Aetna, then moved for judgment notwithstanding the verdict or, alternatively, a new trial on all claims. By Memorandum and Order dated July 29, 1977, the court granted judgment notwithstanding the verdict on the interstate financing portion of plaintiffs' Sherman Act claims, 435 F. Supp. at 1321, and ordered a new trial on the other claims against each defendant, *id.* at 1321-26, except Aetna.[9] The court refused plaintiffs' request for certification of an interlocutory appeal of the new trial order pursuant to 28 U.S.C. § 1292(b). This court by unpublished order dated February 17, 1978 then dismissed for lack of jurisdiction plaintiffs' appeal of the new trial order.

Late in 1977, before the second trial, First Wisconsin and Marshall-Michigan filed a motion for summary judgment and a renewed motion for judgment notwithstanding the verdict based upon the then-recent decisions of the United States Supreme Court in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977), and *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977). A part of this motion contained a challenge to the standing of certain plaintiffs to sue under section four of the Clayton Act. The court denied the principal portions of the motions but dismissed a subsidiary of the Corporation and a number of its principal officials.[10] The court, however, stayed the motion to dismiss Wil-Ten pending plaintiffs' presentation of their damage theories at the second trial. After that presentation, the court dismissed Wil-Ten for lack of standing.

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[9] The court denied plaintiffs' motion for a new trial on its claims against Aetna. 435 F. Supp. at 1326-27.

The second trial concluded on June 19, 1978 with a jury verdict for defendants on all issues. Shortly thereafter, plaintiffs moved for a new trial, which the district court denied. This appeal followed.

II.

An order granting a new trial is not a final order within the meaning of 28 U.S.C. § 1291 and is therefore generally not appealable. *Eady* v. *Foerder,* 381 F.2d 980 (7th Cir. 1967). Nevertheless, after a new trial and entry of final judgment an appellate court entertaining an appeal from the final judgment may review the new trial order and, where appropriate, reinstate the original verdict. *See Ajax Hardware Manufacturing Corp.* v. *Industrial Plants Corp.,* 569 F.2d 181 (2d Cir. 1977); *Dassinger* v. *South Central Bell Telephone Co.,* 537 F.2d 1345 (5th Cir. 1976); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2818 (1973 & Supp. 1979). Appellate review of a new trial order, however, is exceedingly limited because of the broad discretion that trial judges possess in this area. *Durant* v. *Surety Homes Corp.,* 582 F.2d 1081, 1088 (7th Cir. 1978). Only upon a clear showing that a trial judge abused this broad discretion may an appellate court overturn a new trial order. *Hahn* v. *Becker,* 588 F.2d 768, 771 (7th Cir. 1979); *Stinebower* v. *Scala,* 331 F.2d 366, 367 (7th Cir. 1964). In reviewing the new trial order entered by

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[10] The court dismissed plaintiffs Juneau Square Services, Inc., Harold C. Smith, III, Jack D. Moertl, and John F. Spoden because any injury they may have suffered was derivative. Plaintiffs conceded Moertl and Spoden lacked standing. However, their dismissal and the dismissal of Juneau Square Services, Inc., and Smith is one of the items set forth in plaintiffs' notice of appeal. Nevertheless, since plaintiffs did not pursue the matter in their briefs or at oral argument, we shall not address it.

Judge Warren we do not seek to substitute our judgment for his judgment that a new trial was appropriate. We seek only to determine whether he abused his discretion.

The court granted a new trial on the basis of four principal factors: (1) prejudicial effect of admission of certain hearsay testimony and evidence, (2) the weight of the evidence did not establish the conspiracy requisite under the Sherman Act, (3) an unfair imbalance between the time allotted to plaintiffs and defendants for presentation of their respective cases, (4) jury confusion over the nature of the antitrust claims and the appropriate damages. In sum, the court concluded, these factors resulted in a "miscarriage of justice." 435 F.Supp. at 1326.[11]

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[11] Plaintiffs' threshold claim is that the court's grant of a new trial "in the interest of justice," a ground not specifically asserted in defendants' motion, was effectively a sua sponte grant of a new trial. They argue that under Fed. R. Civ. P. 59(d), the court acted without jurisdiction since the order was entered more than ten days after entry of judgment. Rule 59(d) provides:

> *On Initiative of Court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

In so arguing, plaintiffs misread the relevant portion of the court's order. The court did not grant a new trial for reasons not stated in defendants' motion. The court's statement to the effect that a new trial is in the interest of justice merely represents its conclusion drawn from consideration of the reasons asserted in defendants' motion. As Professor Wright notes, "Rule 59 gives the trial judge ample power to prevent what he considers to be a miscarriage of justice. It is his right, and indeed his duty, to order a new trial if he deems it in the interest of justice to do so." 11 C. Wright & A. Miller, Federal Practice and Procedure § 2803 (1973 & Supp. 1979).

Plaintiffs separately attack the propriety of Judge Warren's consideration of each of the foregoing factors. In so doing, they rely upon Fed. R. Civ. P. 61, which provides in pertinent part that harmless trial errors, that is those that "do[] not affect the substantial rights of the parties," are not proper grounds upon which to grant a new trial. That is an accurate statement of black letter law, and one with which Judge Warren is undoubtedly well aware. His conclusion that the trial resulted in a miscarriage of justice indicates he did not believe the errors, in light of the trial setting, the character of the evidence, and the complexity of the legal issues, were harmless. We shall consider his findings on that basis only to the extent necessary to determine whether that conclusion was an abuse of discretion.

Critical to plaintiffs' antitrust claims is the establishment of a nexus between First Wisconsin and the sources of financing that the Corporation pursued. Plaintiffs sought to establish that nexus by showing that First Wisconsin deliberately interfered with plaintiffs' attempts to secure financing from Metropolitan and New York Life.[12] The core of that interference was, assertedly, the credit report that Albert Little of First Wisconsin National Bank orally gave to New York Life upon the latter's request at the time the East financing proposal was before the loan committee. Plaintiffs asked the jury to infer that similar interference blocked their efforts to secure Metropolitan as a source of financing. At trial, Jack Moertl, one of the individual plaintiffs and an officer of the Corpora-

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[12] As the district court noted, 435 F. Supp. at 1321-22, "[w]ithout these overt acts, the conspiracy makes little sense in light of the fact that both Aetna and Marshall-Michigan granted two extensions to the plaintiffs in order to permit them to salvage the project."

tion, testified about a conversation that occurred between him and a Baird & Warner employee, Jack Cisco, on the day the New York Life financing plan collapsed. Moertl testified that Cisco told him that the financing package fell through because of a credit report from First Wisconsin National Bank that painted a very unfavorable picture of the integrity of the Corporation's principals.[13] The court admitted the testimony on the ground that it was not offered for the truth of the matters asserted therein and therefore was not hearsay. Nevertheless, plaintiffs' counsel in cross-examining Little and Holscher and during closing arguments repeatedly characterized this testimony as being indicative of the contents of the credit report.[14] The

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[13] Moertl testified that Cisco told him the following:

> Your New York Life financing is dead. It has been shot down. . . . Someone has given a credit report to New York Life Insurance Company that typifies you as crooks. We are told that we could have just as well sent Al Capone for a loan to New York Life. * * * * [Y]ou and Mr. Spoden have been painted as crooks and . . . the financing is dead.

As to the source of this information, Moertl further testified Cisco told him in that same conversation:

> You should know full well where it came from. It came from the outfit that is building a building next door to you, the First Wisconsin Bank of Milwaukee.

[14] For example, plaintiffs' counsel tendered the following questions to Holscher:

> Q. That's a sophisticated way of a sophisticated banker telling a lender off in New York these people are crooks, isn't it?
>
> * * * *
>
> Q. Isn't it a fact, Mr. Holscher, that it takes quite a bit of thought to draft a report that can kill a project by killing the developers in the eyes of the lender and still hope to avoid libels and slanders . . . ?

Plaintiffs' counsel added to the prejudicial impact of Moertl's testimony:

> Q. That is a very sophisticated way of killing a loan, isn't it, Mr. Little, isn't it?

jury was thus left with the clear, but highly prejudicial, impression that Cisco was reporting on behalf of New York Life the reasons for declining to provide financing.

Plaintiffs' assertion that Cisco was an agent of New York Life because his employer, Baird & Warner, was a New York Life correspondent,[15] has no support in the record. Baird & Warner was acting on behalf of plaintiffs in these negotiations. In any event, even if Baird & Warner was acting as New York Life's agent, Moertl's testimony should have been excluded because there is no suggestion of the source of Cisco's statements or whether he was acting within the scope of his agency. For that reason, plaintiffs' reliance on *Lawlor* v. *Lowe*, 235 U.S. 522 (1915), is misplaced. In a cryptic sentence in that antitrust case, Justice Holmes wrote that "[t]he reason[s] given by customers [to plaintiffs' salesmen] for ceasing to deal with sellers . . . were admissible." *Id.* at 536. Concededly, the customers in *Lawlor* had first-hand knowledge of their reasons for refusing to deal. There is no suggestion that Cisco had any such knowledge. *Lawlor* does not support the proposition that a witness may testify to what a nonwitness said when there is no showing that the non-witness' knowledge of the facts is direct or stems from a reliable source.

We cannot say that the trial court abused its discretion when it concluded that admission of this testimony at the first trial was not harmless error. All witnesses connected with New York Life testified that doubts about Midland National Bank's capabilities caused the rejection. Nevertheless, Moertl's testimony attributed the re-

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[15] An official of New York Life testified that its correspondents are under contract to bring investment opportunities to New York Life's attention and to service loans that they have instigated.

jection to the Little credit report and described the contents of that report in the most inflammatory of terms.

Plaintiffs also introduced a memorandum drafted by William Lutz, chairman of the New York Life loan committee. In that memorandum Lutz wrote that Joe Wilford, a New York Life midwest regional officer, told him that a source at Baird & Warner informed him that First Wisconsin had contacted Baird & Warner to inquire whether the Corporation had any "clout" with New York Life. The memorandum continued:

> [First Wisconsin] apparently made it clear to Baird & Warner that they didn't want this building built—apparently because it would interfere with the timing of the leasing in their proposed building. Our correspondent [Baird & Warner] conveyed to Joe Wilford the feeling that there were veiled intimidations [sic] along the lines that First Wisconsin would use their best efforts to delay or interfere with the construction of this building.

After drafting the foregoing memorandum, Lutz concluded that because of the nature of the statements attributed to First Wisconsin, he should investigate further. In a subsequent memorandum, he reported that the source at Baird & Warner "said there was a misunderstanding—that the two officers of First Wisconsin Bank were simply interested in knowing whether the applicants were actually seeking a loan . . . ." Furthermore, Lutz concluded after speaking with the source's former employer, the source "is considered capable of doing anything to make a deal."

The court admitted the first Lutz memorandum under the umbrella of the business records exception to the hearsay rule. Fed. R. Evid. 803(6). Rule 803(6) contains the proviso that business records are admissible "unless the

source of information or the method or circumstances of preparation indicate lack of trustworthiness." One of the factors the trial court considered in granting a new trial was the apparent unreliability of the initial Lutz memorandum. The statements in that memorandum crossed at least three levels of hearsay. Furthermore, when questioned directly, the Baird & Warner "source" testified he had received only general inquiries from First Wisconsin. These considerations coupled with Lutz' subsequent disavowment after his personal investigation of the information contained in the initial memorandum show just how unreliable that memorandum was in fact. The prejudicial nature of the initial memorandum is apparent on its face. Lutz implicitly charged First Wisconsin with attempting to block any accord that plaintiffs and New York Life might have reached on a financing package. We find no fault and in fact are impressed with Judge Warren's candor in recognizing after the trial that the memorandum should not have been admitted.

Standing alone, the admission of the Moertl testimony and the Lutz memorandum hardly seems sufficient to warrant a new trial. However, as the trial progressed it became more and more apparent that the critical cog in plaintiffs' conspiracy theory was First Wisconsin's alleged interference with the Metropolitan and New York life financing packages. Judge Warren examined the evidence regarding the First Wisconsin-Metropolitan contact and concluded, as was his prerogative, *Durant* v. *Surety Homes Corp.*, 582 F.2d at 1087, that Metropolitan had substantial business reasons for declining to provide financing. In addition, there was no evidence that anything Liek of First Wisconsin National Bank told Metropolitan was inaccurate. Plaintiffs' theory therefore reduced itself to reliance upon the alleged impropriety of the credit re-

port that Albert Little conveyed to New York Life and New York Life's subsequent decision not to finance East. Plaintiffs asked the jury to infer that similar "interference" occurred at Metropolitan. The Moertl testimony and the Lutz memorandum were the only evidence of the causal relationship between the credit report and New York Life's declination of financing. Its admission therefore was most certainly not harmless.

The trial judge, sitting at a much better vantage than this court, relied on the foregoing and a number of other factors to conclude that the verdict in the first trial represented a miscarriage of justice. Some of the other factors he pointed to were a gross imbalance in the time allotted to the parties, jury confusion about the legal theories upon which plaintiffs offered certain items of evidence and about the nature of proof required to award damages, and confusing and erroneous instructions. We need not consider each factor separately to determine whether we would have granted, were we sitting as trial judges, a new trial on the basis of each. As we said before, our review is limited to the question whether the trial judge's conclusion that a miscarriage of justice occurred was an abuse of discretion. If a single ground supports the new trial order, it is not reversible. *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *Nuttall* v. *Reading Co.*, 235 F.2d 546, 548 (3d Cir. 1956). We are convinced that Judge Warren did not abuse his discretion in granting a new trial solely on the basis of the factors we have discussed. We have examined the remaining factors upon which Judge Warren relied and they indicate that he was remarkably thoughtful and candid in evaluating the prejudice that certain of his actions may have caused defendants.

III.

Following entry of the order granting defendant's motion for a new trial, the parties participated in a second trial before the same court. This time the jury found for defendants. Asserting that numerous errors occurred at that trial, plaintiffs appeal to this court to order a third trial.

A. *Restraint of Trade*

During the second trial, the court informed the parties of its intention to instruct the jury that "proof of specific public injury is not required." It is sufficient, the planned instruction read, for plaintiffs to show that the restraint "tends or is reasonably calculated to prejudice the public interest." On the morning of the final day of argument, the court informed the parties that it was taking under advisement one of defendants' proposed instructions that it had earlier rejected. That proposed instruction reads:

> Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. In order to recover under Section 4 of the Clayton Act the plaintiffs must demonstrate that there was injury to competition, not merely injury to a competitor, and that the injury resulted not simply from the violation alleged but reflects the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. I instruct you that the antitrust laws were enacted for the protection of competition, *not* competitors. Therefore, you must find in favor of the defendants unless plaintiffs have proven that defendants' acts injured not only Juneau Square Corp. and/or the other plaintiffs, but competition in the Milwaukee office rental real estate market as well.

As a threshold matter, plaintiffs assert that they did not have a reasonable opportunity to argue the inappropriateness of the proposed instruction or an opportunity to argue the evidence to the jury in terms of the revised instruction. The record indicates, however, that Judge Warren offered plaintiffs ample opportunity to object to any of the instructions. Plaintiffs took advantage of that opportunity to object to the substantive law stated in the instruction but did not object to the timing of the change. That latter failure precludes plaintiffs from objecting now to Judge Warren's timing. Plaintiffs, however, did interpose timely objection to the substantive accuracy of the proposed instruction; the question of the substantive accuracy of the instruction that was actually given is therefore properly before us.

There is some merit to plaintiffs' assertion that the proposed instruction is not an accurate statement of the law. Although it clearly states plaintiffs' burden of showing public injury, it does not mention that that burden may be met by evidence that defendants' conduct tended to or was reasonably calculated to prejudice the public interest. Were the proposed instruction actually given, we might be constrained to reverse. But contrary to plaintiffs' contention, the instruction given did not make the same omission. Apparently to avoid the precise problem plaintiffs find in the proposed instruction, the court trimmed its language and clarified the method by which plaintiffs could meet their burden. The court read the following instruction:

> The term "restraint of trade," which must be the objective or effect of any contract, combination or conspiracy condemned by the anti-trust laws contemplates only an unreasonable restraint of trade. The law recognizes that it may be impossible to

> conduct a business without in some degree restraining trade. The antitrust laws were enacted for the protection of competition, not competitors. The plaintiffs must, therefore, establish that the defendants' acts injured not only the plaintiffs themselves, but competition in the leasing of office rental space in the central business district of the City of Milwaukee.
>
> The plaintiff is not entitled to recover in this case by showing concerted activities of the defendants restrained interstate commerce to some degree, *they must show that there was an unreasonable restraint. A restraint is unreasonable if it tends or is reasonably calculated to prejudice the public interest. . . .* [T]he plaintiff may not recover unless you find an unreasonable restraint by a preponderance of the evidence as defined in these instructions. (emphasis added)

The italicized portion of the instruction correctly states plaintiffs' burden of showing that defendants' actions tended or were reasonably calculated to prejudice the public interest, which, as the first subparagraph of the instruction correctly states, lies in free and open competition in the CBD office rental market.

In another instruction, the court, over defendants' objection, instructed the jury that the purpose of the Sherman Act is "to preserve and advance our system of free competitive enterprise and to encourage to the fullest extent practicable free and open competition in the marketplace." An adverse effect upon competition, however small, is the distinguishing characteristic of a restraint of trade in contrast to a business tort. We have little trouble imagining the possible confusion of a juror struggling with the distinction between these two unlawful acts. Without the instruction given, the court's instruction on the purpose of the Sherman Act likely

would have misled the jury into believing that it could find for plaintiffs upon a showing that nothing more than a business tort occurred. The Sherman Act requires more than mere injury to a competitor. Plaintiffs must show also that the "effect upon competition in the marketplace is substantially adverse." *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 375 (1967); *see Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977); *Magnus Petroleum Co.* v. *Skelly Oil Co.*, 599 F.2d 196, 204 (7th Cir.), *cert. denied*, ... U.S. ..... (1979); *Lee Klinger Volkswagen, Inc.* v. *Chrysler Corp.*, 583 F.2d 910, 914-15 & n.6 (7th Cir.), *cert. denied*, 439 U.S. 1004 (1978). The instruction is thus a fair statement of the law phrased in language fair to both parties. Absent the instruction, the jury might have been led to believe by the other instruction that it could award damages for injuries arising from conduct that had no impact on the relevant market merely because plaintiffs and defendants were competitors in that market.

Plaintiffs' reliance on *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), and *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), for the proposition that it need not show actual injury to competition is misplaced. Those cases involved group boycotts, a per se antitrust violation. Unlike the present case, which was properly analyzed using the rule of reason, *see* pp. 24-25 *infra*, per se violations are by nature presumed to have a "pernicious effect on competition." *Northern Pacific Railway* v. *United States*, 356 U.S. 1, 5 (1958). Absent that presumption, the instruction given in this case properly apprised the jury of plaintiff's burden.

B. *Aetna*

Plaintiffs next challenge as error the court's instruction to the jury that "you may not find that Aetna Life Insurance Company was a member of the alleged con-

spiracy." At the core of plaintiffs' challenge is its assertion that when Judge Warren ordered a new trial, he should have included all parties. (The jury in the first trial found in favor of Aetna.) As we have noted elsewhere in this opinion, *see* p. 12 *supra,* appellate review of the grant of a new trial motion is exceedingly limited. That same standard—abuse of discretion—defines our review of the denial of a new trial motion. *Vizzini* v. *Ford Motor Co.,* 569 F.2d 754, 759 (3d Cir. 1977).

The grant of a new trial to a party who has received an adverse verdict does not require the grant of a new trial to a party who has received a favorable verdict. *Somerville* v. *Capital Transit Co.,* 192 F.2d 413 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 941 (1952). The factors that the trial court relied upon in granting a new trial to the other defendants were prejudicial to all defendants, including Aetna, and therefore tended to reinforce the verdict in favor of Aetna. Under these circumstances, plaintiffs are hardpressed to contend that Judge Warren abused his discretion by not ordering Aetna to stand trial again. The instruction here challenged was therefore not in error. Were plaintiffs' theory to prevail in the kind of case presented here, Fed. R. Civ. P. 59(a), which specifies that a trial court may order a new trial as to "all or any of the parties and on all or part of the issues," would be emasculated.[16]

Plaintiffs further argue that even if the trial court did not err in precluding the jury from finding that Aetna was a conspirator, it did err in forbidding plaintiffs from

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[16] The question of the participation by any one party in an alleged conspiracy is a separable issue that is not intertwined with the question of participation by other parties in such a way to require a new trial for all where a new trial is granted to some. *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 247 (1940).

arguing or the jury from finding that Aetna was controlled and manipulated by the other defendants. Although plaintiffs had not previously relied upon this theory, they contend the trial judge should have read their third amended complaint with greater breadth. We have examined that complaint and find nothing there supportive of plaintiffs' argument. Their theory throughout the case was that Aetna was a conspirator, not the unwilling dupe of other defendants. The trial judge correctly recognized that such an assertion would require further amendment of the complaint. We see no error in the decision to deny the motion for leave to amend after commencement of the second trial and five years since the filing of the original complaint. Plaintiffs' attempt to do so is little more than an attempt to undercut the verdict in favor of Aetna in the first trial. In any event, plaintiffs are unable to point to any prejudice they suffered as a result of the foreclosure of their "control and manipulate" argument. Plaintiffs remained free to, and in fact did, present evidence that First Wisconsin interfered with plaintiffs' attempt to secure financing from Aetna. Short of permitting relitigation of Aetna's complicity in the alleged conspiracy, the court allowed plaintiffs substantial room both in argument and in the introduction of evidence.

Plaintiffs contend also that the court erred in instructing the jury that insufficient evidence was presented upon which to find that Aetna's declination of financing for East was due to the alleged conspiracy. We disagree. There was no evidence that either Aetna or Shapiro knew that First Wisconsin was Shapiro's principal. Even more telling is the fact that Aetna rejected plaintiffs' financing application one week *before* the Shapiro contact in 1969. The 1972 contact between Aetna and First Wisconsin occurred *after* foreclosure of plaintiffs' interest in the project.

Plaintiffs contend that notwithstanding the foregoing, the instruction foreclosed jury consideration of the pos-

sibility that First Wisconsin may have attempted to interfere with the proposed financing. Our reading of the careful language of the instruction is that it foreclosed consideration of the causation question only. There is no suggestion in the instruction that the jury should not consider whether First Wisconsin attempted to interfere with the financing package.

C. *Per Se Rule*

The trial court refused plaintiffs' request that the jury be instructed that the use of unfair methods of competition to further a conspiracy to destroy the business of a competitor is per se violative of section one of the Sherman Act. Plaintiffs' theory is rooted in *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir.), *cert. denied*, 286 U.S. 552 (1932). The *Pick-Barth* rule, once accepted in the First Circuit, *Atlantic Heel Co.* v. *Allied Heel Co.*, 284 F.2d 879 (1st Cir. 1960); *but see George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975), and in the Tenth Circuit, *Perryton Wholesale, Inc.* v. *Pioneer Distributing Co.*, 353 F.2d 618 (10th Cir. 1965), *cert. denied*, 383 U.S. 945 (1966), has never been accepted by this circuit and we decline to adopt it today. The definition of "unfair methods" is simply too amorphous a basis upon which to predicate a departure from the rule of reason. *See Northwest Power Products, Inc.* v. *Omark Industries, Inc.*, 576 F.2d 83, 88 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979). We follow instead the mandate of the Supreme Court that such departures "be based upon demonstrable economic effect rather than upon formalistic line drawing." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. at 59. In view of the variety of practices—and resulting economic effects—that conceivably may be characterized as unfair methods of competi-

tion, *see Developments in the Law—Competitive Torts,* 77 Harv. L. Rev. 888 (1964), the determination whether a practice or practices challenged solely on this basis is cognizable under the Sherman Act is better left to the more particularized consideration possible under the rule of reason.

We fully concur with Judge Roney's observation in *Northwest Power Products,* 576 F.2d at 90, that "the line drawn by the *Pick-Barth* doctrine is so vague, and the circumstances in which its application manifests any injury to competition so dependent on individual facts that it does not merit the *per se* characterization some of the early cases give it." *See also Stifel, Nicolaus & Co.* v. *Dain, Kalman & Quail, Inc.,* 578 F.2d 1256, 1260-62 (8th Cir. 1978). The trial judge properly refused plaintiffs' tendered instruction.

Plaintiffs raise numerous other objections to sundry jury instructions, evidentiary rulings, and to the court's conduct of the trial. We have given each of those objections thorough consideration and find none to be meritorious. In light of that consideration and the foregoing discussion, we shall affirm the jury verdict in favor of defendants in the second trial.

IV.

Upon completion of plaintiffs' case-in-chief at the first trial, the court granted defendants' motions for directed verdicts on plaintiffs' claims under section two of the Sherman Act. In ruling on those motions, the trial court and now this court on appeal are constrained to view the evidence in the light most favorable to plaintiffs.

It is well-established that the elements of a Sherman Act section two monopoly offense are "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence

of a superior product, business acumen, or historic accident." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570 (1966); *see also Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704, 711 (7th Cir. 1979), *cert. denied*, ... U.S. ..... (1980). At trial, plaintiffs asserted that the relevant market was the CBD and that the product was readily available office space. The court accepted these definitions for purposes of ruling on the motions, as we do for purposes of reviewing the propriety of granting them. Within this market, the court found, plaintiffs failed to present any proof tending to establish that defendants possessed substantial power in this market, and, therefore, plaintiffs failed to satisfy their burden on the first *Grinnell* requirement.

Although plaintiffs now seek to place a figure next to defendants' market share, they did not seek to do so at trial. There plaintiffs asserted that establishment of a specific market share is only one way to determine whether defendants possess monopoly power, *i.e.*, the power to control prices or to exclude competition. *United States* v. *E.I. Du Pont De Nemours & Co.*, 351 U.S. 377 (1956). That proposition is well-established in the law. *See United States* v. *Columbia Steel Co.*, 334 U.S. 495, 527-28 (1948); *Kearney & Trecker Corp.* v. *Giddings & Lewis, Inc.*, 452 F.2d 579, 597-98 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972). Plaintiffs, however, after asserting their right to establish market power in other ways, failed to do so, which resulted in the directed verdicts.

Plaintiffs' evidence of market power took two forms. First, they presented an expert witness who testified that he was uncertain of the power held by other lessors of office space in the CBD. Absent any indication of defendants' market share and the experts' uncertainty about the strength of defendants' competitors the trial court was quite clearly correct in preventing this speculative issue from reaching the jury. Since section two imposes liability for a monopolist's status and not necessarily his con-

duct, a much more rigorous showing is required. Second, plaintiffs offered a market study prepared by an organization identified only as "Urban Investment and Development Company" and submitted to the "Milwaukee Development Group." Even assuming the relevance of that 1975 study, it provides little support for plaintiffs' theory. They argue before this court for the first time that the study indicates that First Wisconsin holds a seventy percent share of the relevant market. The problem in accepting this or any figure derived from the study is that only "major" office buildings are included. The study, however, lacks any definition of that term or any indication of the quality and quantity of office space within the relevant market that is not contained in "major" buildings. Any market share calculated on such an imprecise base is simply too speculative to reach the jury.[17]

V.

We have considered and rejected as lacking merit the remaining assertions of error that plaintiffs raise. For all of the foregoing reasons, the judgment of the district court in favor of defendants is affirmed.

AFFIRMED.

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[17] The trial court also granted directed verdicts against plaintiffs under section two of the Sherman Act on their attempt to monopolize and conspiracy to monopolize claims. As to the attempt claim, the absence of evidence on First Wisconsin's market share also makes consideration of its likelihood of success, *see Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d at 711, a highly speculative venture and one the court properly kept from the jury. Plaintiffs were not prejudiced by the directed verdict on the conspiracy to monopolize claim. A conspiracy to monopolize would necessarily constitute a conspiracy in restraint of trade under section one of the Sherman Act. Plaintiffs were free in the second trial to prove a conspiracy in restraint of trade and were not precluded from presenting any evidence as a result of the directed verdict. Moreover, the jury could not have found a conspiracy to monopolize while finding, as it did, that there was no conspiracy in restraint of trade.

District Court Memorandum and Order Granting and Denying Defendants' Motions for Directed Verdict (First Trial)

UNITED STATES DISTRICT COURT
EASTERN DIVISION OF WISCONSIN

Case No.72-C-533

JUNEAU SQUARE CORP., et al.,

Plaintiffs,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, et al.,

Defendants.

MEMORANDUM AND ORDER

At the conclusion of plaintiffs' case in chief, defendants moved for directed verdicts pursuant to rule 50 of the Federal Rules of Civil Procedure. Defendants have set forth various grounds in support of the aforestated motions in urging the Court to find that there is insufficient evidence in the record upon which the jury could properly find a verdict for plaintiffs. In reviewing the record, the Court is precluded from weighing the

evidence or passing upon the credibility of witnesses or substituting its judgment for that of the jury. *See,* Wright & Miller, Federal Practice and Procedure: Civil § 2524 at 543. The Court must in effect view the evidence in a manner favorable to the plaintiffs and draw all reasonable inferences in support of plaintiffs' case. *Continental Co.* v. *Union Carbine,* 370 U.S. 690 (1962); *Valdes* v. *Karoll's, Inc.,* 277 F.2d 637 (7th Cir. 1960).

Notwithstanding the foregoing, it is clear that more than a "scintilla of evidence" is required to overcome a motion for a directed verdict. *Gunning* v. *Cooley,* 281 U.S. 90 (1930); *Hubert* v. *May,* 292 F.2d 239 (7th Cir. 1961). Defendants therefore need not show that there is no evidence supporting plaintiffs' claims but only that there is *insufficient* evidence upon which the jury could properly find a verdict.

After reviewing relevant portions of the trial transcript, the exhibits, and the briefs submitted in support of and in opposition to defendants' motions, and having been duly advised in the premises thereto, the Court is of the opinion that the motions must be granted in part and denied in part accordance with the following memorandum opinion.

I.

The Aetna Life Insurance Company (Aetna)[1] bases its motion for a directed verdict upon, *inter alia,* the lack of proof of "knowing participation" or a "conscious awareness" on the part of Aetna in any scheme or conspiracy either in restraint of trade or of monopolization. Aetna concedes for the purposes of this motion that the other

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[1] Plaintiffs concede that a directed verdict should be entered in favor of the other Aetna defendant, the Aetna Casualty & Surety Company, on the basis of insufficient proof in the record.

defendants may have combined or conspired in violation of the antitrust laws of the United States but urges that there is a complete absence of any evidence implicating Aetna in that conspiracy.

In fact, Aetna notes that the record does not contain evidence of a single communication between Aetna and the First Wisconsin defendants during the relevant period and that it was only after plaintiffs had been foreclosed that a lawful mortgage agreement was reached with the alleged conspirators.

Plaintiffs vigorously challenge this assertion and rely upon the proposition that the prior acts of conspiracy on the part of the other defendants are attributable to Aetna because of its subsequent participation in the conspiracy even as late as 1972. *Cf. United States* v. *Martinez,* 481 F.2d 214 (5th Cir. 1973); *Van Riper* v. *United States,* 13 F.2d 961 (2nd Cir. 1926). It is clear that plaintiffs rely heavily on circumstantial evidence and the inferences drawn therefrom to sustain their claim of conspiracy. As there is no direct evidence of an agreement on Aetna's part to restrain trade or to monopolize with the named conspirators, the Court must carefully review the circumstantial evidence in the record.

Plaintiffs first rely upon Aetna's refusal to finance the third phase of the Juneau Square Project referred to as Juneau Square East by its promoters. The record clearly indicates that Aetna expressed an interest in the entire project and as late as early 1969 contemplated the financing of Juneau Square East. Aetna financed the first two phases of the project and agreed to a moratorium on principal payments under the existing mortgage in 1967. The moratorium was designed to pay for the renovation of portions of the existing project and provide additional

funds for the acquisition and development of phase III. Plaintiffs subsequently expended in excess of $600,000.00 in preparation for the anticipated development of phase III. From the foregoing, the jury could readily infer that Aetna had expressed an interest in Juneau Square East and had represented to plaintiffs that it had every intention of financing Juneau Square East.

The evidence also indicates that by early 1969 plaintiffs were in default under the existing mortgage by virtue of unpaid taxes in the amount of $245,000.00. The acknowledged undercapitalization of the entire project of which Aetna was clearly aware because of the moratorium on principal payments made in 1967 and this now rather substantial default under the existing mortgage are evidence from which the jury could readily infer that Aetna had substantial business justifications for refusing to finance the third phase of the Juneau Square project. Whether Aetna desired to remain in the project if new owners were found is another question. The jury could reasonably infer a continuing interest in the existing project by Aetna's refusal of the Shapiro offer discussed below.

At the same time that Aetna was reaching its decision to deny financing, the First Wisconsin defendants had decided to acquire the Juneau Square Project. Pursuant to this plan, a Chicago attorney (Shapiro) was instructed to contact Aetna to seek their assistance in the contemplated acquisition or at the very least to acquire the existing mortgage on the project.[2] Although there is a factual

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[2] There is a factual dispute in the record as to the instructions given to Shapiro and his interpretation of those instructions. The written memorandum suggests that ownership of the project was sought through Aetna's assistance. Shapiro testified that he merely inquired as to Aetna's interest in selling the mortgage.

dispute as to the nature of the plan as construed by the various agents of the First Wisconsin defendants, there is little dispute as to what occurred at that meeting. Aetna expressed no interest in the Shapiro overture. As it is undisputed that Shapiro was unaware that he represented the First Wisconsin defendants, there is no evidence in the record from which the jury could properly find that Aetna had knowledge of First Wisconsin's interest in the project at this time. The Court, therefore, is of the opinion that the Shapiro contact failed to establish knowledge or agreement on the part of Aetna to join the alleged conspiracy.

Plaintiffs next argue that even if Aetna did not join the conspiracy as a result of the Shapiro contact, Aetna's subsequent conduct provides ample evidence that Aetna had joined the conspiracy at some point after that initial contact. Critical to this claim is the fact that Aetna's mortgage covered a portion of the property necessary for the development of phase III. In order to obtain financing, plaintiffs required the cooperation of Aetna in order to obtain a release or "air rights" agreement. With Aetna's denial of financing, plaintiffs set out to obtain alternate financing and simultaneously offered $250,000 in exchange for a release and later agreed in principal to an offer of $295,000. Aetna rejected this offer and suggested in lieu thereof an "air rights" agreement.

Aetna's conduct in refusing to grant a release is inconsistent with the prior course of dealings between the parties over the previous eight years. Moreover, it aggravated the already serious financial situation of the Juneau Square promoters. Aetna may have had sufficient business justifications for refusing to finance Juneau Square East in light of the economic instability of the existing project, but this Court is unable to find any justifi-

cation for the almost predatory attitude of Aetna in refusing to grant a release at this crucial time. There is evidence in the record upon which the jury could properly find that Aetna, which had encouraged the promoters from the outset, was now becoming *uncooperative.*

There is again no direct evidence that Aetna had knowledge of First Wisconsin's interest in the project. The jury could nonetheless reasonably infer that a change of attitude had occurred at Aetna; Aetna was not only not cooperating, but was in fact frustrating the efforts of the Juneau Square promoters. The critical question here is why the change in attitude? Did Aetna in fact have knowledge of the conspiracy and reach some understanding with the other named conspirators?

The timing of events is of critical significance. Aetna was aware that plaintiffs were in the process of arranging financing with the Metropolitan Life Insurance Company in New York at this time. On September 30, 1969, Metropolitan agreed that an air rights agreement would suffice. The following day plaintiffs met with Aetna to work out an air rights agreement. Instead of proceeding ahead, Aetna requested a "parking analysis" prior to the formulation of any agreement. With knowledge of the impending financial arrangement with Metropolitan, Aetna had to be aware of the consequences of further delay and the jury could so infer. Under the circumstances, a parking analysis may have been justified, but Aetna insisted that preparation for the air rights agreement be delayed. In this regard, plaintiffs were subsequently advised by Walsh who was an Aetna official that "we [Aetna] never intended to give you an air rights agreement." [T. 1433-1435, 1441, 1443] This is yet another indication of Aetna's frustration of the financing of phase III.

Again, the crucial question here is what is the motivation behind the lack of cooperation on the part of Aetna? There is no direct evidence that Aetna had joined in the plan of the First Wisconsin defendants to obtain the Juneau Square Project, but the circumstantial evidence to that effect cannot be discounted. There is evidence that First Wisconsin had publicly announced its intention to acquire some of the parcels of land adjacent to the Project. The public announcement does not of course reveal First Wisconsin's plan to acquire the Juneau Square project and, therefore, is of little probative value on the issue of whether Aetna had knowledge of the existence of the alleged conspiracy.

Plaintiffs next point to the fact that Aetna sent its foreclosure papers in October 1969 to the law firm of Foley & Lardner in Milwaukee. Foley & Lardner represented both Marshall-Michigan and the First Wisconsin defendants. Aetna's agent testified that the foreclosure papers were sent in the "blind," i.e. sent without prior contact by merely selecting one of the law firms in the area from Martindale-Hubbell. Plaintiffs argue that in light of the other circumstantial evidence in the record, the jury could find that this constituted a conspiratorial act.

Standing alone, the improvident selection of Foley & Lardner could be construed as merely coincidental although the size of the loan and the apparent concern of Aetna over the default raise serious questions about the selection procedure. Coupled with the less than cooperative attitude of Aetna towards the Juneau Square promotors, the act takes on added significance. Is this additional evidence from which the jury could find that by this point in time Aetna had reached a tacit understanding with the other named conspirators?

The next event which occurred was the loss of the Metropolitan financing. There is evidence of a communication from a First Wisconsin official but there is again no direct evidence linking Aetna with that communication. Again, however, the timing of the loss of the Metropolitan financing is of critical importance. Aetna's refusal to grant a release or air rights agreement *parallels* the conduct of the other conspirators who were in a position to interfere with the financing efforts of plaintiffs. The timing of events is highly circumstantial, but the weight to be accorded such evidence is a question for the trier of fact.

After Aetna commenced its foreclosure action, Marshall-Michigan prepared a check for $245,000 payable to Aetna to cure the default on the Aetna mortgage. New York counsel for Marshall-Michigan came to Milwaukee with the check and conferred with a member of the law firm of Foley & Lardner. At that time, they were advised of the interest of the First Wisconsin defendants in acquiring the Juneau Square Project. The dual role of the attorneys from Foley & Lardner in representing both Marshall-Michigan and the First Wisconsin defendants is highly probative of the issue of knowledge on the part of Marshall-Michigan.

The subsequent tender of the check was conditional and in effect provided for a security priority senior to the Aetna mortgage. The tender was rejected and a series of meetings between Aetna and Marshall-Michigan were arranged to work out an agreement as to the course of action to be followed in light of the pending foreclosure action. Marshall-Michigan's mortgage which was in a high risk position in light of the substantial senior Aetna mortgage, provided substantial motivation on the part of Marshall-Michigan to cooperate with the First Wisconsin defendants, and the jury could so infer. In fact, Marshall-

Michigan eventually managed to salvage a substantial portion of its initial investment.

The agreement provided as follows (Ex. 318 B):

> We agreed that Marshall-Michigan and Aetna would enter into an informal agreement whereby Marshall-Michigan would pay the 1968 delinquent taxes as well as all penalties accrued, make monthly deposits for real estate taxes for 1969 and *subsequent years,* and agree to pay Aetna the regular monthly installments of interest and principal. In its turn, Aetna would agree to maintain its foreclosure action until such time as Marshall-Michigan obtains judgment. At this point, we would drop our action assuming that we were assured that there was no possibility that Juneau Square Corp. could seek protection through the bankruptcy court in the unlikely event that Marshall-Michigan was subsequently to drop its foreclosure action.

As a result of this agreement, Marshall-Michigan commenced its own foreclosure action. Plaintiffs claim that this agreement is plainly conspiratorial and attribute an ulterior motivation to Aetna. That motive is the existence of a defense to the Aetna foreclosure based upon a theory of equitable or promissory estoppel. That defense was not available to plaintiffs in the Marshall-Michigan foreclosure action.

As previously noted, Marshall-Michigan had knowledge of First Wisconsin interest in the project and was in a position to convey that knowledge to Aetna. While it is true that the agreement does not refer to the ultimate disposition of the property or the plan of the First Wisconsin defendants to acquire the existing project, the question is whether the jury could infer from all the evidence in the record that some "understanding" to that effect had been reached. Of particular significance in this regard is the

fact that almost immediately after the foreclosure of plaintiffs' interest in the project, Marshall-Michigan salvaged a substantial portion of its initial investment and Aetna reached a favorable mortgage agreement with the First Wisconsin defendants.

Plaintiffs resisted the Aetna foreclosure and ultimately two agreements were reached. Although Aetna claims that the settlement agreements were favorable to plaintiffs, the fact remains that in exchange Aetna obtained a waiver of plaintiffs' equitable defenses and redemption rights and a financing deadline after which it could enter a default judgment. During the critical financing periods, plaintiffs sought an air rights agreement; Aetna failed to provide the necessary agreement or delayed meeting the request until the financing had fallen through.

At the same time, there is evidence of knowledge on the part of the First Wisconsin defendants of the various financing efforts of the Juneau Square promoters and communications from these defendants to some of the potential sources of alternate financing. These communications invariably occurred at the latter stage of the financing effort and were inexplicably followed by a loss of the sought after mortgage commitment. The timing of events is again critical to plaintiffs' case. As there is no explicit agreement setting forth the respective roles of the alleged conspirators, the jury could infer that the parallel conduct of the defendants was purely coincidental and not pursuant to a common scheme or understanding. Nonetheless, the jury could also infer to the contrary.

Shortly after the foreclosure of plaintiffs' interests, Marshall-Michigan sold its interest to Marshall-Wisconsin, a subsidiary of the First Wisconsin Corporation. Marshall-Wisconsin then entered into discussions with Aetna which resulted in a favorable mortgage agreement. This agreement is the first direct evidence of any agreement or

for that matter of any communication between Aetna and the First Wisconsin defendants. It is plaintiffs' position that the jury could infer the existence of and knowing participation in a conspiracy on the part of Aetna as a result of this final agreement and the circumstantial evidence of conspiratorial conduct which preceded the final agreement. The final agreement embodies plaintiffs' theory of the conspiracy.

Assuming that there is evidence in the record from which the jury could properly infer the existence of a conspiracy among the other named defendants, the pivotal question is whether the conduct as detailed above is sufficient to implicate Aetna in that conspiracy. Although the question is not free from doubt, the Court is of the opinion that there is more than the scintilla of evidence necessary to overcome a motion for a directed verdict.

The evidence is admittedly of a highly circumstantial nature, but the Court is hesitant to substitute its judgment for that of the jury. The parallel conduct of the various defendants which is consistent with a common scheme or plan to eliminate the Juneau Square promoters could be the result of pure coincidence. On the other hand, it could also be the result of a conspiracy in restraint of trade. The fact that there is no evidence of an express agreement between the parties is not fatal to plaintiffs' case.

In *United States* v. *General Motors,* 384 U.S. 127, 142 (1966), the Court stated:

> It is of no consequence, for purposes of determining whether there has been a combination or conspiracy under § 1 of the Sherman Act, that each party acted in its own lawful interest. . . . it has long been settled that *explicit agreement* is not a necessary part of a Sherman Act conspiracy—certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan.

The jury could infer that at some unknown point in time the parties reached an understanding or agreement because of the timing of events and related conduct of the various defendants. Aetna's motion for a directed verdict as it relates to the claims in restraint of trade must therefore be DENIED.

II.

After reviewing portions of the transcript, various exhibits and the briefs submitted in support of and in opposition to the motions of Marshall-Michigan and the First Wisconsin defendants as they relate to the claims in restraint of trade, and having been duly advised in the premises thereto, the Court is of the opinion that there is sufficient evidence in the record upon which the jury could properly find a verdict for plaintiffs. Although the issue is not free from doubt with regard to Marshall-Michigan, the Court is hesitant to substitute its judgment for that of the jury. If the Court were the trier of fact, perhaps a different result would have been reached, but here the Court's role is severely limited as noted in part I of this memorandum opinion.

III.

Defendants' claim that there is insufficient evidence in the record from which the jury could properly find the existence of monopolization or an attempt to monopolize on the part of the First Wisconsin defendants or a conspiracy to monopolize on the part of the other defendants. Plaintiffs concede that there is insufficient evidence to support a claim of monopolization or an attempt to monopolize on the part of Aetna or Marshall-Michigan.

Although the First Wisconsin defendants challenge plaintiffs' definition of relevant market and defined prod-

uct,[3] they principally rely upon the lack of proof of monopoly power within the relevant market. It is clear that "the offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth . . ." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570 (1966). Monopoly power is defined as the power to control prices or exclude competition. *United States* v. *Dupont & Co.*, 351 U.S. 377 (1955).

Monopoly power is assessed by the percentage share of the relevant market as the existence of a substantial market share is highly probative of the alleged monopolist's ability to control prices or to exclude competition. Although the Supreme Court has never adopted a set standard, Judge Hand in *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945), established guidelines which have been generally accepted as an accurate measure of monopoly power:

> [Ninety percent] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not.

The Seventh Circuit has adhered to these guidelines. *Kearney & Trecker Corporation* v. *Giddings & Lewis, Inc.*, 452 F.2d 579 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066

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[3] The Court is persuaded that there is sufficient evidence in the record to support an inference that the relevant market is the Central Business District and that the product is readily available office space which is defined as vacant space and that occupied space which would be readily available within a reasonable time period. The exact time limitations of the latter category were not accurately defined by plaintiffs' expert, but the estimate was anywhere between 2-9 months.

(1972); *Bendix Corporation* v. *Bolox, Inc.*, 471 F.2d 149 (7th Cir. 1972).

Plaintiffs rely upon *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948) and *Kearney & Trecker Corp.* v. *Giddings & Lewis, Inc., supra,* for the proposition that the existence of monopoly power does not require proof of a particular percentage share of the relevant market. If by this, plaintiffs suggest that the Supreme Court has not articulated a particular percentage figure in the sense that one selects 60 or 65 or 70 percent as a cutoff, this Court has no quarrel with the proposition. It is quite another thing to suggest that the Supreme Court has obviated the need for a showing that defendants control a substantial share of the relevant market. Neither the authority cited above nor any other authority brought to the Court's attention has suggested such a proposition.

Judge Hand indicated that sixty (60) percent would probably not be a sufficient showing. A review of recent caselaw indicates that in most cases the percentage figure is much higher. The Court need not concern itself with whether plaintiffs have established a sufficient market share because the record is practically devoid of such evidence. This total absence of proof is revealing in light of the fact that figures are presumably available and that plaintiffs represented in their briefs and supporting affidavits in opposition to the motions for summary judgment that such figures were available.

Plaintiffs concede that they have not established the market share controlled by the First Wisconsin defendants. In lieu thereof, they argue that market share is merely a means to help determine whether or not a defendant has power to control prices or exclude competition and that monopoly power may be proven more directly by other means:

> Monopoly power can, of course, be proved by evidence of the exercise of actual control over prices or the actual exclusion of competitors. When such evidence is lacking, the existing monopoly power over the relevant market may be proved in other ways. In such cases a *full* and *complete economic evaluation* of the structure of the market and its functioning is necessary to determine whether, considering all factors, including *the relative size and strength of competitors, freedom of entry, pricing trends* and *practices, profits,* and *consumer demands,* the firm's power over supply, prices or entry is of such a nature as to constitute a monopoly. (emphasis added). *Antitrust Law Developments,* A.B.A. at 53 (1975).

The difficulty with plaintiffs' position is that they failed to make a full and complete economic evaluation of the structure of the market.

Plaintiffs' expert testified as to various economic factors including, *inter alia,* the existence of inherent barriers to entry in the market, the existence of economic power on the part of the First Wisconsin defendants because of its large assets and position as the largest bank in the State of Wisconsin, the fact that some of the directors of the first Wisconsin defendants are also directors of other large corporations, and the fact that First Wisconsin is able to subsidize its Juneau Square properties at a loss.

Notwithstanding the foregoing, plaintiffs' expert testified that he was uncertain as to the power in the market in the hands of *other sellers* of the product, and, in effect, conceded that he had not made a *complete* economic evaluation of the relevant market. It is quite apparent that plaintiffs' expert relied upon "bigness" in the abstract sense. Failure to consider the power of the other sellers in the market is fatal to plaintiffs' claims of monopolization.

There is no evidence indicating that there is an absence of competitors or of substantial competitive office space in the relevant market.

The little evidence in the record indicates that the market is saturated with sellers and readily available office space. Plaintiffs' exhibit 591 is a copy of a market study prepared by the Urban Investment and Development Co. for the Milwaukee Development Group, Inc. The study clearly indicates that although First Wisconsin is the largest seller in the market, it is but one of many. These figures are admittedly imprecise, but the study indicates that there is substantial competition from the MGIC building, the First Federal Plaza, the Marine Plaza, the Century Building, the Plankinton building, and many others. The four buildings listed above alone possess as much vacant space as the First Wisconsin Center.

Moreover, the study reveals that there is a varied price structure and that competitors do charge less and are in direct competition with the First Wisconsin defendants. Plaintiffs have submitted evidence from which the jury could infer that the First Wisconsin defendants charge more than any other competitor but that is their perogative. There is no proof in the record that such prices in any way effect the prices charged by competitors and absent a showing that defendants control a substantial share of the market, there is no evidence in the record to support the inference that lessees are forced to accept the so-called monopolistic prices of the First Wisconsin defendants.

Plaintiffs' expert placed much reliance on the fact that the First Wisconsin defendants set their prices upon the ground that the only real competition in "first class" office space was the MGIC building and the First Federal Plaza. The difficulty with this approach is that plaintiffs have not defined the product as available first class office

space in the Central Business District. It goes without saying that first class office space is limited to the newer and more prestigious buildings of Milwaukee. Of these buildings, the First Wisconsin defendants definitely have an edge because of the imposing size of the First Wisconsin Center. The fact remains that the more prestigious buildings logically charge and conceivably are able to receive more for their office space. But here we are dealing with all of the available office space in the Central Business District which includes first class office buildings as well as the other office buildings in the relevant market.

In the final analysis, plaintiffs have not met their burden of proof as to the requirement of a showing of monopoly power. This Court would be remiss if it permitted the jury to speculate as to the power of the First Wisconsin defendants in an isolated manner without a consideration of the power of the other sellers in the market place.

IV.

Defendants also challenge the claim of attempt to monopolize principally upon the ground that there is no evidence from which the jury could find that there is a "dangerous probability" of monopolization.

> The phrase "attempt to monopolize" means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it, which methods, means and practices are so employed by the members of and pursuant to a combination or conspiracy formed for the purpose of such accomplishment. *American Tobacco Co.* v. *United States,* 328 U.S. 781, 785 (1946).

At the outset, it should be noted that plaintiffs have not established the market share of the defendants as dis-

cussed in part III of this opinion. Of course, plaintiffs need not show that defendants control a substantial share of the market, but proof of *some* share of the market is highly probative of the issue of whether a "dangerous probability" of monopolization exists. The absence of this critical economic data forces the jury to speculate as to the existence of any market share.

Regardless of the failure of proof cited above, the Court must concern itself with the issue of whether defendants' conduct, if continued, is likely to lead to monopoly power in the relevant market. Defendants raise two issues in this regard. First, attention is called to the fact that the First Wisconsin defendants have already indicated in writing to the Deputy Controller of the Currency and the Regional Administrator of National Banks their intention to sell the former office building and have attempted to sell it for some time. This sale, if effectuated, would drastically reduce defendants' share of the relevant market. This intent, it is argued, is clearly inconsistent with the requirement of a showing of specific intent in claims of attempted monopolization. Plaintiffs assert that defendants have not seriously attempted to dispose of the building but that in and of itself does not eliminate the requirement that First Wisconsin must eventually sell the building thereby reducing its market share.

Even if First Wisconsin manages to hold onto its former office building, further expansion into the market is proscribed by federal banking regulations. As such, this situation is analogous to that found in *Bendix Corporation* v. *Balax, Inc.*, 471 F.2d 149 (7th Cir. 1972). There a finding of invalidity with regard to certain patents effectively precluded the consummation of a monopoly. Without the patents, the alleged monopolization could not succeed.

In the case at bar, defendants are effectively precluded from further expansion in the relevant market by the following:

> A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:
>
> First. Such as shall be *necessary* for its *accommodation in the transaction of its business.*
>
> Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.
>
> Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.
>
> Fourth. Such as it shall purchase as sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.
>
> But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years. (emphasis added) 12 U.S.C. § 29.

Regulation 7.3005 promulgated thereunder provides as follows:

> Real estate necessary to the accommodation of the bank's business includes real estate other than that upon which bank buildings are located. Thus, real estate use for parking facilities and data processing centers is necessary in the transaction of business. Such real estate also includes that held for future banking use, where the bank in good faith expects to utilize such property as bank premises. This will permit a prudent program of property acquisition for future bank use. Such real estate is to be treated as bank premises owned and so reported. 12 C.F.R. 7.3005.

Defendants cannot avoid these statutory provisions and regulations. Moreover, the Bank has sufficient space for expansion purposes for the next several decades. There is no way that the First Wisconsin defendants can obtain the substantial market share proscribed by the antitrust laws of the United States. In fact, the defendants are obligated to sell the former bank building as discussed above. Under these circumstances, the jury could not properly find the existence of a dangerous probability of monopolization.

Without reviewing the evidence of conspiracy to monopolize against Aetna and Marshall-Michigan, it is clear that plaintiffs' claims must fail because of a failure to prove monopolization or attempt to monopolize as discussed above. One cannot conspire to monopolize without the existence of monopoly power or even the existence of a dangerous probability of monopolization in the one party which is alleged to be the monopolist. Defendants' motions for directed verdicts as they relate to the claims of monopolization, attempt to monopolize, and conspiracy to monopolize must therefore be granted.

NOW THEREFORE IT IS ORDERED that the motion of the Aetna Casualty & Surety Company for a directed verdict be and is hereby GRANTED;

IT IS FURTHER ORDERED that the motions of the Aetna Life Insurance Company, Marshall-Michigan Company, Inc., and the First Wisconsin defendants for directed verdicts be and are hereby DENIED as they relate to the claims in restraint of trade and be and are hereby GRANTED as they relate to the claims of monopolization.

So ordered this 30th day of September, 1976, at Milwaukee, Wisconsin.

/s/ *Robert W. Warren*
United States District Judge

District Court Memorandum and Order Granting Defendants New Trial

JUNEAU SQUARE CORP., Wil-Ten Co., Inc., Juneau Square Services, Inc., Ralph W. Conway, Hal Bradley & Associates, Inc., Emil Bartel, Anna Bartel, Vione Perry, as Administratrix of the Estate of Thomas H. Perry, Harold C. Smith, III, as Administrator of the Estate of Harold C. Smith, Jr. and Mildred B. Smith, Jack D. Moertl and John F. Spoden, Plaintiffs,

v.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, First Wisconsin Development Corporation, First Wisconsin Corporation, Marshall-Michigan Company, Inc., Marshall-Wisconsin Company, Inc., Aetna Life Insurance Company and the Aetna Casualty and Surety Company, Defendants.

Civ. A. No. 72-C-533.

United States District Court, E. D. Wisconsin.
July 29, 1977.
[435 F.Supp. 1307 (1977)]

MEMORANDUM AND ORDER

WARREN, District Judge.

The plaintiffs commenced this civil antitrust action for treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15 (1970), alleging that the defendants violated (1970).

After four years of extensive discovery, summary judgment was granted in favor of the defendants on the claim

arising under section 7 of the Clayton Act.[1] On May 3, 1976, a jury was selected and the parties proceeded to trial on the remaining claims. At the conclusion of plaintiffs' presentation of the evidence, the Court granted defendants' motions for directed verdicts on the monopoly claims.[2] The only remaining claims—the restraint of trade violations asserted under section 1 of the Sherman Act—were submitted to the jury at the close of all of the evidence. On October 1, 1976, the jury returned a verdict in favor of the plaintiffs.[3]

The cause is presently before the Court on a variety of post-trial motions. The First Wisconsin defendants and Marshall-Michigan Company, Inc. ("Marshall-Michigan") have moved for judgment notwithstanding the verdict or in the alternative, for a new trial or to amend the judgment entered on October 26, 1976.[4] The Aetna Life Insur-

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[1] *Juneau Square Corp.* v. *First Wisconsin National Bank of Milwaukee,* Civil No. 72-533 (E.D.Wis., memorandum and order dated July 14, 1976).

[2] The Court also granted the motion for a directed verdict filed in behalf of the Aetna Casualty and Surety Company. *Juneau Square Corp.* v. *First Wisconsin National Bank of Milwaukee,* Civil No. 72-533 (E.D.Wis., memorandum and order dated September 30, 1976).

[3] The jury found that the various First Wisconsin defendants and Marshall-Michigan Company, Inc., conspired to unreasonably restrain the trades of (1) the leasing, development, construction and operation of office rental space and (2) the financing for the development of office buildings. The Aetna Insurance Company was the only defendant not found to be a member of the conspiracy and judgment was duly entered in its favor.

[4] The First Wisconsin defendants consist of the First Wisconsin Corporation and its wholly-owned subsidiaries, the First Wisconsin National Bank of Milwaukee, the First Wisconsin Development Corporation. and the Marshall-Wisconsin Company, Inc.

ance Company ("Aetna") and the Aetna Casualty and Surety Company have moved for the award of attorneys' fees. The plaintiffs have moved to amend the judgment and for the award of reasonable attorneys' fees as authorized under section 4 of the Clayton Act. The plaintiffs have also moved for a new trial as to Aetna if any relief is granted to the First Wisconsin defendants or Marshall-Michigan on their respective motions for judgment notwithstanding the verdict or for a new trial.[5]

In order to understand the contentions of the parties, the Court will endeavor to *highlight* the various acts and events which form the basis for the antitrust conspiracy.[6] In some respects, this presentation of the evidence emphasizes plaintiffs' theory of the case. For example, inferences which were urged by the plaintiffs will be referred to from time to time. This approach was adopted because of the nature of the motions before the Court and the fact that the jury found in favor of the plaintiffs.

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[5] The plaintiffs, both individual and corporate, were engaged either directly or indirectly in the development, promotion, management, and operation of commercial real estate. The plaintiffs are the Juneau Square Corporation, Wil-Ten Co., Inc., Juneau Square Services, Inc., Ralph W. Conway, Hal Bradley & Associates, Inc., Emil Bartel, Anna Bartel, Vione Perry, as Administratrix of the Estate of Thomas H. Perry, Harold C. Smith, III, as Administrator of the Estate of Harold C. Smith, Jr., and Mildred B. Smith, Jack D. Moertl and John F. Spoden.

[6] The condensation of over twelve thousand pages of transcript testimony and hundreds of exhibits proved to be a difficult task. The acts and events which are set forth in this memorandum and order are considered to be the most significant aspects of the case. In view of the importance of the motivations of the conspirators, some detail is provided in this area.

FACTS

In 1960, plaintiff Wil-Ten Co., Inc. ("Wil-Ten") embarked upon a building project in the central business district in Milwaukee, Wisconsin. The project was initially conceived as an effort to, in part, supply the office needs of the Aetna defendants.

The southwest quadrant of the Juneau Square block was ultimately selected as the location for the project. This parcel of land was considered to be ideal; the proposed project would provide prospective tenants with an excellent view of the lakefront and at the same time be within walking distance of the center of the downtown business district. The disadvantages were twofold. The present owner, the Milwaukee Redevelopment Authority, required the plaintiffs to develop the entire block as a condition of the purchase—a substantial undertaking relative to the financial strength of Wil-Ten. In addition to this problem, there were several decrepit buildings alongside the proposed construction site. Aetna was understandably not anxious to have its new premises adjacent to these buildings.

In order to accommodate the demands of both the Milwaukee Redevelopment Authority and Aetna, and the limited capital available for the project, Wil-Ten planned to develop the project in three phases.[7] Juneau Square Corporation was formed as a wholly-owned subsidiary of Wil-Ten to develop and manage the project. Construction

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[7] The basic concept called for the development and construction of three office buildings with an underground parking structure. The three phases were respectively designated as Juneau Square South, Juneau Square North, and Juneau Square East.

of phase I, which was named Juneau Square South, was completed in late 1963. As phase I was nearing completion, work on Juneau Square North began. The permanent financing for both buildings was provided by Aetna.

In 1965 and 1966, additional capital was obtained. Plaintiffs Ralph W. Conway, Hal Bradley & Associates, Emil and Anna Bartel, and Thomas H. Perry each purchased interests totalling 25 percent of the existing project. Defendant Marshall-Michigan purchased another 50 percent for one million dollars and as part of the agreement, received a junior mortgage on the existing project. Sale and leaseback agreements were negotiated in each instance. Juneau Square Corporation retained operational control of the project.

Phases I and II were nearing completion by October, 1967. At this time, the plaintiffs began preparations for Juneau Square East, the third and final phase of the project. Further funds were apparently needed to complete tenant space improvements in Juneau Square North and to begin Juneau Square East. In order to temporarily accommodate these needs, Aetna agreed to a moratorium on principal payments under the loan for the permanent financing for phases I and II.

During the next year and a half, the plaintiffs proceeded with their plans for the construction of Juneau Square East. In early 1969, the basic plans and specifications were completed. By this time, however, the plaintiffs were in default under the mortgages with Aetna and Marshall-Michigan on the first two phases of the project. The plaintiffs had neglected to pay the real estate taxes on the project, a sum in the amount of $245,000.00. The cash flow from the existing project, the infusion of capital in 1965

and 1966 and the moratorium on principal payments had proven to be insufficient to both maintain the project and to proceed with the third phase.[8] At this point in time, the plaintiffs were in a precarious financial position. Unless a financing package could be arranged to permit the construction of Juneau Square East and to cure the deficiencies under the mortgages on the *existing* project, foreclosure was inevitable.

Meanwhile in late 1968, the First Wisconsin Corporation had embarked upon a program to develop a new "First Wisconsin Center" adjacent to the Juneau Square Project. This project would place approximately one million square feet of new office space on the market.[9] Market studies indicated that the demand for new office space in Milwaukee's central business district was such that up to 200,000 square feet could be absorbed annually (PX 446, 498, 520-22, 589-91). Juneau Square East with approximately 300,000 square feet of office space was scheduled to be completed just prior to the First Wisconsin Center. It is this competitive pressure which is the underlying theory of plaintiffs' case.

The officer in charge of the development of the First Wisconsin Center was Richard Holscher. He immediately

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[8] The economic viability of the first two phases of the project was drawn into question by the defendants. The plaintiffs attributed the insufficiency of the funds to the fact that Juneau Square North and South were burdened with the development costs for the proposed construction of Juneau Square East.

[9] The First Wisconsin defendants planned to occupy half of the existing office space in the new First Wisconsin Center leaving approximately one-half million square feet for the public. The vacation of their existing headquarters placed an additional one-half million square feet on the market.

set out to assemble the land with the assistance of the Northwestern Mutual Life Insurance Company. During this period, he also investigated the possibility of acquiring adjacent parcels for expansion purposes. George Kasten, the president of the First Wisconsin Corporation, testified that he had been warned of the need for additional property for future expansion by bank presidents in Chicago and Houston who had underestimated their space requirements. (Tr. 8510-15).

One of the adjacent parcels was the property on which Juneau Square East was to be built. Holscher testified that he reviewed the credit files on Juneau Square Corporation and Wil-Ten, both customers of the First Wisconsin National Bank of Milwaukee. His stated purpose for the review was to investigate the status of the project in order to determine the availability of the property for expansion purposes. Both Kasten and Holscher denied that they were motivated to acquire the property because of the threat of potential competition from Juneau Square East.

Dickens, an employee of the bank, testified that these files were considered to be confidential and that only selected officers of the bank were permitted access to them. Holscher was not on the access list. (Tr. 7471-72) The plaintiffs argued that this deviation from bank policy and conversion of confidential credit information for the bank's own use was "illegal" in that it constituted a gross violation of the bank's duty to maintain the confidentiality and privacy of its credit files. The jury was asked to infer that this was one of the unfair methods of competition

utilized by the First Wisconsin defendants as a part of the conspiracy in restraint of trade.[10]

In early March, 1969, Holscher met with David Shute, an attorney for the First Wisconsin Corporation. During this series of meetings, plans for the acquisition of the Juneau Square Project were discussed. A few days later, Shute forwarded a handwritten memorandum to an attorney in Chicago named Harold Shapiro (PX 303, 304). This memorandum directed Shapiro to contact Aetna and reads in pertinent part as follows:

> 5. We have reason to *believe* Aetna might like out of the situation—
>
> a. low rate
>
> b. shaky financial history of project & its developers
>
> We understand developers have been trying to raise funds for new project from various sources, and they are apparently down to Aetna & will be filing application next week for loan for "East" project . . .
>
> * * *
>
> 6. Our strategy:
>
> a. As representative of interested undisclosed prin., contact Aetna for prelim. discussions. We believe best contact wd. be ——— Swinehart, who

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[10] The plaintiffs rely upon *Milohnich* v. *First National Bank*, 224 So.2d 759 (Fla.App.1969), and *Peterson* v. *Idaho First National Bank*, 83 Idaho 578, 367 P.2d 284 (1961), to support the view that the bank acted "illegally" in this regard. Aside from the fact that there is some doubt as to the applicability of these cases, the Court is not persuaded that there is anything inherently illegal about the review of credit files by any *member* of the bank. However, the careless handling of this information could give rise to a tort or, as in the case at bar, the improper use of this information could be construed as an act in furtherance of the conspiracy.

> once held title of V.P. in charge of Mgages. Might start with him, see where he leads you.
>
> • • •
>
> b. Our client's int. is to purchase entire block for cash. Our knowledge of details of deal, as disclosed to Aetna, shd. be limited to what we might have been able to find out w/o "insider" info (will leave to your good judgment) We would pay fair *cash* price equal to market value.

The timing of this memorandum is significant. The memorandum notes that the plaintiffs were "down to Aetna & will be filing application next week for loan on the 'East' Project." The memorandum implicitly directs Shapiro to convince Aetna that it was in Aetna's best interests to deal with the First Wisconsin defendants rather than proceed with the financing of Juneau Square East.

Shapiro subsequently met with Aetna on March 18, 1969. Aetna indicated that they were not interested, and the matter was dropped. Aetna was not informed that the First Wisconsin Corporation was Shapiro's principal.

In the interim, the plaintiffs attempted to persuade Aetna to provide the needed financing for Juneau Square East. After some preliminary discussions, Aetna advised the plaintiffs that it would not finance East in a letter dated March 11, 1969. The plaintiffs immediately set out to obtain alternative financing.

During the next eight months, the plaintiffs attempted to obtain financing from the Metropolitan Life Insurance Company of New York ("Metropolitan"). Some delay in these negotiations resulted from plaintiffs' inability to reach an accommodation with Aetna with respect to the grant of a release as to that portion of the Aetna mortgage which covered some of the property on which Juneau

Square East was to be built. Aetna subsequently indicated some willingness to provide air rights and easements, an accommodation which was apparently acceptable to Metropolitan, and the negotiations continued.

While these negotiations were proceeding, Metropolitan contacted James Liek, an employee at the First National Bank of Milwaukee, for an opinion of the Juneau Square property and the Juneau Square developers. Liek testified that he told Metropolitan that "it was good real estate and that the only thing [he] knew about the borrowers was that they had had difficulty in making Phase 1 and 2 work out, and that they had a loan outstanding with the bank which was overdue and had been extended and that [he] assumed they were aware of that" (Tr. 5040). Liek also indicated that he was unaware of any interest on the part of the First Wisconsin defendants in acquiring the project at that time (Tr. 5036-39). There was, however, documentary evidence that Liek was at the meeting when the First Wisconsin Corporation Executive Committee granted formal authority to acquire Juneau Square (PX 458).[11]

The Metropolitan negotiations continued into early November, 1969. Warren Stringer of Dunn & Stringer made arrangements for a meeting between Metropolitan and the plaintiffs to work out any remaining difficulties and to

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[11] Liek was apparently asked to appear at the executive committee meeting to give a report unrelated to the matters at issue in the case at bar. An employee of the bank testified that the uniform practice at such meetings was to have the person appear for the report and then depart immediately thereafter (Kuehl, Tr. 9294-8). There is therefore some doubt as to whether Liek was present when the committee actually discussed the acquisition of Juneau Square.

see if some final agreement could be reached (Tr. 5092-94). Stringer also testified that he believed that the negotiations were "moving along" at this time (Tr. 5089). Plaintiff Jack Moertl, who was participating in the negotiations, was of the opinion that agreement had been reached (Tr. 1297-1322).

Prior to any meeting with Metropolitan, a meeting which was apparently set for November 5, 1969, the plaintiffs were notified that the needed financing would not be provided. Stringer testified that he was surprised by the decision but could not remember the precise reasons given for the declination; he indicated that they probably were "cash flow, yield, alternative forms of investment, things of this nature." (Tr. 5095). Moertl stated that no explanation was ever given (Tr. 1324).

The testimony and contemporaneous memoranda of those responsible for the declination of plaintiffs' loan application indicate that there were several reasons for the rejection.

> There were several reasons for it, we were in a very selective market at that point in time, rates were high, the mortgagee was being very selective in terms of the properties that they were underwriting and mortgaging, and, at that point in time, this property did not—the projections, our analysis indicated it was not a satisfactory mortgage or equity situation for us. (Dolan, Tr. 10,745).

In a letter to Stringer, Lane, also of Metropolitan, stated:

> Unfortunately the Metropolitan cannot consider this project in today's highly restricted market. It appears that there are more attractive investments available to the company. Also, the financial analysis indicated that the investment does not produce a cash flow and yield of alternative investments. (WX 51).

Shortly after Metropolitan declined to provide the financing for Juneau Square East, the plaintiffs received another setback. Aetna commenced a foreclosure action because of plaintiffs' failure to pay the real estate taxes on the project.

After Marshall-Michigan received notice of the Aetna foreclosure, Sann and Clark, who were general counsel for the corporation in New York, came to Milwaukee with a check payable to Aetna to cure the tax default, a sum in the amount of $245,000.00. Boerema, Marshall-Michigan's managing agent for the Juneau Square project, stated that he was told by either Sann or Clark that the intention of Marshall-Michigan was to cure the tax default and reinstate the Aetna mortgage (Tr. 5310). On arrival, they conferred with Robert Bradley, local counsel for Marshall-Michigan.

Bradley knew that the First Wisconsin defendants were interested in the project. He advised Sann and Clark of this fact and arranged for a meeting between representatives of Marshall-Michigan and the First Wisconsin defendants. At this meeting, Sann testified that he asked whether the "bank or one of its affiliate companies might want to buy our position as is, and that is to say, subject to the foreclosure action." Sann related that "Mr. Holscher did not express any interest in buying our position as is, but expressed an interest in possibly buying it after the foreclosure action had been cured." (Tr. 9860). Holscher stated his reasons for rejecting the overture from Marshall-Michigan.

> I was not interested in getting involved in a foreclosure and that is the reason that I could not get together with Marshall-Michigan. They wanted to sell their interest and go through the legal problems, and I said I'm not interested in that. I'm not interested

> in the property. Somebody's going to have to do that. I am not going to, and I just said I will see what happens (Tr. 7,640-41).

During this period, Marshall-Michigan unsuccessfully attempted to acquire some control over the project. A letter was sent to all of the Juneau Square tenants directing them to pay rentals into a special bank rather than to Juneau Square Corporation (PX 164). Sann testified that he and Clark were of the impression that the plaintiffs had diverted funds from the existing project to Juneau Square East (Tr. 9,797-98). Marshall-Michigan, of course, had no interest in the third phase of the project. Sann stated that "the purpose [of the letter] was to accomplish what we regarded as our first task, namely to stop further diversion of rents of the existing project into new projects." (Tr. 9804). Sann also indicated that by this time, Marshall-Michigan had decided to foreclose the plaintiffs (Tr. 9819).

Sann and Clark next met with representatives of Aetna. Sann and Clark explained their predicament to Aetna.

> We expressed concern about our investment, we told Aetna that we were going to institute second mortgage foreclosure proceedings, and that we were going to request the Court for the appointment of a receiver in order to make certain that all the rent monies would be applied to their proper functions . . . (Tr. 9876).

Aetna apparently was persuaded to hold its foreclosure action in abeyance to permit Marshall-Michigan to go ahead with its plans to attempt to gain control of the project (Tr. 9877).

Shortly thereafter, Marshall-Michigan commenced its own foreclosure action against the plaintiffs and immediately moved for the appointment of a receiver. The

presiding judge refused to appoint a receiver and according to Sann, Aetna adopted the position that the agreement "was of no further existence or validity." (Tr. 9878).

The plaintiffs asked the jury to infer that Marshall-Michigan joined the conspiracy during this period. This inference was based on the following circumstances. Prior to the commencement of the Aetna foreclosure action, Marshall-Michigan had cooperated with the plaintiffs in the development of the project. When Sann and Clark came to Milwaukee their intention was to cure the tax default and reinstate the mortgage. After conferring with local counsel, a meeting was arranged with the First Wisconsin defendants. As a result of this meeting and the subsequent attempts of Marshall-Michigan to acquire control of the project set forth above, the jury was asked to infer that Marshall-Michigan joined the conspiracy in order to salvage its investment interest in the project. Knowledge of the conspiracy in restraint of trade is imputed to Marshall-Michigan because of the fact that both Marshall-Michigan and the First Wisconsin defendants were represented by the same law firm; they presumably were both fully advised of the situation before reaching agreement and Marshall-Michigan was in any event presumably aware of the competitive position of the plaintiffs and the First Wisconsin defendants.

At this point in time, the parties entered into negotiations in both foreclosure actions. The parties subsequently entered into a stipulation which provided the plaintiffs with a period of time to obtain financing for Juneau Square East. The defendants also agreed to provide the necessary air rights and easements over that portion of the property under the Aetna and Marshall-Michigan mortgages. In exchange, the defendants ob-

tained a waiver of all defenses to the foreclosure actions, a waiver of plaintiffs' right of redemption, and the right to enter judgment after the financing deadline. That deadline was September 30, 1970.

The plaintiffs then attempted to obtain the necessary financing. Negotiations with both Cooper-Horwitz and Phillipsborn were unsuccessful.[12] Near the end of the deadline, the plaintiffs were making substantial progress with Diversified Financial Corporation of America and the Midland National Bank. A commitment was obtained shortly after the deadline passed. Difficulties, however, arose with respect to the grant of air rights by Aetna and the financing fell through.

After the deadline passed, Aetna tried to have judgment entered in accordance with the stipulation. The presiding judge refused to enter judgment and set the matter on for trial. This decision was precipitated in part because of Aetna's failure to reach some accommodation with the plaintiffs with regard to the necessary air rights. At this point in time, the parties entered into a second stipulation with a new deadline of December 31, 1971. Additional provisions were added to permit Marshall-Michigan to proceed ahead of Aetna in foreclosing the plaintiffs.

The plaintiffs now turned to the New York Life Insurance Company ("New York Life") for the necessary financing. After preliminary negotiations, the financial

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[12] The plaintiffs asked the jury to infer that the First Wisconsin defendant probably interfered with these negotiations because of the evidence of interference with respect to the Metropolitan and subsequent New York Life loan applications. There was no direct evidence linking the defendants with the loss of financing with either Cooper-Horwitz or Phillipsborn.

application was forwarded from the Chicago office to the home office with a favorable recommendation. The matter was then submitted to New York Life's Real Estate and Mortgage Loan Committee on May 5, 1971 for initial approval. If the loan committee approved the loan, the loan application would be referred to the finance committee for final approval.

There is little evidence of what occurred at the May 5 meeting. Boone, a member of the committee, stated that there was some question as to the financial strength of the Midland National Bank ("Midland"). Rather than approve or decline the loan application, the matter was withdrawn to permit further investigation (Tr. 10,918-19). Rose, another member of the committee, also indicated that the financial strength of Midland was a principal concern. He further stated that he had already made up his mind to reject the loan application (Tr. 11,067-68). At the conclusion of the meeting, Lutz, who was the chairman of the loan committee, asked Duncan to make further inquiries as to the financial strength of Midland (Tr. 11,069).

Duncan was the treasurer of New York Life. After the May 5 meeting, he contacted Albert Little, a business acquaintance at the First Wisconsin National Bank of Milwaukee, and asked him to do a credit check.[13] Little checked the credit files at the bank and called Davey a few days later. Davey, a subordinate of Duncan, had been assigned the responsibility of following through on the credit checks. He incorporated the contents of the con-

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[13] The plaintiffs emphasized the fact that both George Kasten, the president of the First Wisconsin Corporation, and Little were acquainted with Duncan. The jury was asked to infer that Duncan was motivated to join the conspiracy because of this relationship.

versation with Little in a contemporaneous memorandum which was sent to the members of the committee (PX 404). Little testified that he had no knowledge that the First Wisconsin defendants were interested in acquiring the project. (Tr. 9532-34). There is, however, documentary evidence that a summary of the status of the Juneau Square Project was forwarded to Little at this time. The Davey memorandum reads in pertinent part as follows:

> We were told that the property has been developed in instalments and was "bootstrapped all the way." They have a high debt. It was believed that the mortgage held by the Aetna was in trouble and the lender has agreed to defer foreclosure. Our source bank had a part in the construction lending and found proceeds were not being used as indicated. There appeared to be several recent judgments and liens against the property.
>
> It was our source's opinion that the entire project was not adequately financed. Recent high interest rates gave them real problems.
>
> The Midland National Bank was described as a retail oriented institution that has made reasonable progress. They took over a bank a short while ago and this accounts for a jump in deposits from $60 million to $100 million. The bank's President, Mr. Kelly, was described as a very aggressive banker who was not well liked in the local financial community. He had been with the Marine Bank where, he led a proxy fight to get control of the corporation that was largely owned by interests close to the bank for which he was working.

The plaintiffs asked the jury to infer that Little had knowledge of the conspiracy and intentionally falsified the credit report in order to interfere with plaintiffs' loan application.

The loan application was again submitted to the committee on May 19, 1971. This time the application was rejected by a vote of five to 1. The minutes of the meeting indicate that the loan was rejected because Midland was found to be unqualified (PX 388). Boone (Tr. 10,922-10,926), Rose (Tr. 11,072-76), and Lutz (Tr. 7217-22) all confirmed that this was the principal reason for the declination. Another reason given was the complexity of the transaction (Tr. 7215-19). Neither Boone nor Rose could recall whether the integrity of the developers was even brought up at the meeting. The only evidence which indicates that this may have been a factor was a subsequent New York Life memorandum which reads in pertinent part as follows (PX 383):

Mr. Lutz indicated:

1. Sponsors had mis-handled funds and were being foreclosed.
2. Bank was not sufficiently capitalized to handle gap funds.

The loss of the New York Life financing was followed by still another attempt to obtain financing; this time the plaintiffs directed their efforts at the Baird & Warner Real Estate Investment Trust ("REIT"). By late December, 1971, the parties were nearing agreement. Because of the approach of the financing deadline, the plaintiffs sought and obtained an extension from Aetna at a meeting on December 20, 1971. Aetna, however, conditioned its agreement on the acquiescence of Marshall-Michigan.

Sann testified that during this period, he maintained the position that no extension would be granted by Marshall-Michigan unless agreement was reached with REIT

by the end of the year (Tr. 9886). Krauss of Baird & Warner, who discussed the matter with Sann indicated that Sann agreed to postpone the entry of judgment to permit further negotiations with REIT (Tr. 12,695-96). Sann denied ever making such an agreement (Tr. 9885-86).

The plaintiffs failed to reach agreement with REIT by the December 31, 1971 deadline. Marshall-Michigan entered judgment pursuant to the stipulation between the parties on January 3, 1972. Aetna followed on January 4, 1972, and the REIT financing fell through. Marshall-Michigan purchased the property for a nominal sum at a sheriff's sale held on February 28, 1972. The property was, of course, purchased subject to the Aetna mortgage. Marshall-Michigan subsequently sold its interest in the project to Marshall-Wisconsin Company, Inc., a subsidiary of the First Wisconsin Corporation. Marshall-Wisconsin proceeded to reach an agreement with Aetna which, *inter alia,* established a new mortgagor-mortgagee relationship. The First Wisconsin defendants thereby obtained control of the Juneau Square Project.

I.

The gravamen of the complaint is that the defendants, through the use of unfair methods of competition, conspired to eliminate the plaintiffs as competitors in the rental of office space in downtown Milwaukee. As a result of the conspiracy, the defendants acquired the existing Juneau Square Project and thereby prevented the construction of Juneau Square East. The jury found that the defendants conspired to unreasonably restrain competition and the defendants now urge the Court to set aside that verdict. The Court will first consider defendants' motions for judgment notwithstanding the verdict.

A motion for judgment notwithstanding the verdict is in effect a renewal of the motion for a directed verdict made at the close of the evidence. In each instance, the Court is obligated to view the evidence and all reasonable inferences in the light most favorable to the plaintiffs. *Continental Co.* v. *Union Carbide*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962); 9 Wright & Miller Fed.Prac. & Pro. § 2537 at 596 (1971); 5A Moore's Fed.Prac. ¶50.7[2] at 2356 (1966). Both motions are properly denied "[when] the evidence is such that reasonable men in a fair and impartial exercise of their judgment may draw different conclusions therefrom." *Hannigan* v. *Sears, Roebuck and Co.*, 410 F.2d 285, 287 (7th Cir. 1969).

Notwithstanding the foregoing, it is clear that more than a mere "scintilla of evidence" is required. *Gunning* v. *Cooley*, 281 U.S. 90, 50 S.Ct. 231, 74 L.Ed. 720 (1930); *Hubert* v. *May*, 292 F.2d 239 (7th Cir. 1961). Accordingly, the defendants are not required to show that there is a total absence of any evidence on the claims at issue but only that there is *insufficient* evidence upon which reasonable men could properly base a verdict.

The sufficiency of the evidence is challenged in two respects. The defendants first contend that the plaintiffs failed to establish the existence of a contract, combination, or conspiracy either to attain an illegal end or to attain a legal end by the use of illegal means.

The position of the defendants may be summarized as follows. There is no evidence of anticompetitive motivation on the part of the defendants. The only evidence in the record on this subject indicates that Marshall-Michigan and Aetna were concerned with protecting their investment interests, and the First Wisconsin defendants were only concerned with acquiring the property for ex-

pansion purposes. Accordingly, the legality of the "end" of the conspiracy—the acquisition of Juneau Square—is beyond dispute. Once this characterization of the evidence is adopted, the defendants proceed to isolate each of the various acts and agreements between the parties and demonstrate their legality. The only acts which could in any way be construed as being illegal are viewed as being attributable to the First Wisconsin defendants. Assuming for the sake of argument that the jury found some of these acts to be illegal, there is no evidence that Marshall-Michigan or any other non-First Wisconsin defendant acted illegally or took steps to implement a conspiracy with knowledge that illegal means were being employed.

In reviewing the evidence, the Court has consistently adopted the position that the plaintiffs need not establish that each act was illegal. It is only necessary that the acts whether legal or illegal be in furtherance of a common plan or conspiracy in restraint of trade. *American Tobacco Co.* v. *United States,* 147 F.2d 93 (6th Cir. 1944), *aff'd,* 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946); *Schulman* v. *Burlington Industries, Inc.,* 255 F.Supp. 847 (S.D.N.Y. 1966). The significant issue in this respect is whether the defendants were motivated to restrain competition. That motivation may be inferred from the character and effect of the conspiracy. The fact that a particular act or agreement is legal or illegal is of little consequence unless when viewed in the context of the conspiracy, it tends to prove that the defendants were motivated to restrain competition. Accordingly, all of the circumstances surrounding the conspiracy must be taken into consideration. *Lessig* v. *Tidewater Oil Co.,* 327 F.2d 459 (9th Cir.), *cert. denied,* 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964); *Ramsey* v. *United Mine Workers of America,* 265 F.Supp. 388 (E.D.Tenn.

1967), *aff'd*, 416 F.2d 655 (6th Cir. 1967), *reversed on other grounds*, 401 U.S. 302, 91 S.Ct. 658, 28 L.Ed.2d 64 (1971).

With these considerations in mind, the Court has carefully weighed the evidence and is of the opinion that there is sufficient evidence to support the finding of the jury. Much of the evidence is admittedly of a circumstantial nature. Great emphasis has been placed on the nature, timing, and sequence of the various acts which form the basis for the anti-trust conspiracy. This has given rise to considerable disagreement as to the inferences to be drawn from the evidence.

The defendants' position is premised in large part upon the assertion that the objective of the conspiracy was legal. The plaintiffs adopted a contrary position; the objective of the conspiracy was the elimination of competition. While there is evidence that the First Wisconsin defendants merely desired the property for future expansion purposes, the surrounding circumstances and activities of the various conspirators indicate another possible motivation. The jury was aware of the fact that Juneau Square East was in a position to assert competitive pressure on the new First Wisconsin Center. The evidence indicated that the only real competition in the area for "first class" office space consisted of the MGIC Plaza and the First Federal Plaza. The size and location of Juneau Square East would have undoubtedly altered this situation.

The jury was also confronted with the extensive efforts made in behalf of the First Wisconsin defendants, including, *inter alia*, the early Shute-Shapiro effort, the extensive and varied negotiations over the years with Aetna and Marshall-Michigan, and the Little credit re-

port. The timing and nature of these efforts are significant. For example, the Shute memorandum establishes the intent of the First Wisconsin defendants to take over the *entire* block; and reveals detailed knowledge of plaintiffs' financial situation, the proposed construction of Juneau Square East, and plaintiffs' need for further financing. The memorandum notes that the plaintiffs were "down to Aetna & will be filing application next week for loan on the 'East' project" and implicitly directs Shapiro to convince Aetna that it was in Aetna's best interests to deal with the First Wisconsin defendants rather than proceed with the financing of Juneau Square East.

The jury was asked to believe that these extensive maneuverings were motivated by some unknown expansion need in the distant future. In rejecting this view of the evidence, the jury obviously weighed the circumstantial nature of much of the evidence proffered by the plaintiffs and found it to be more persuasive than the explanations of the First Wisconsin defendants. The apparent inconsistencies in the testimony of certain witnesses probably played a key role in this decision.[14] In weighing the evidence in the light most favorable to the plaintiffs, particularly the credibility of the various witnesses, the Court is unable to say that there is no support in the record for the verdict of the jury as to the First Wisconsin defendants.

The evidence of Marshall-Michigan's role in the conspiracy is more troublesome. There is no doubt that Marshall-Michigan was motivated to oust the plaintiffs

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[14] There were varying explanations and apparent inconsistencies surrounding the Shute memorandum and the Little credit report. These were probably the two most significant aspects of the case.

from the project. The project was in a precarious financial position and Marshall-Michigan was in a position to suffer a substantial business loss. The First Wisconsin defendants provided an obvious solution to this dilemma. The evidence clearly indicates that Marshall-Michigan assisted the First Wisconsin defendants in the acquisition of the project. The difficult question is whether this defendant "knowingly" participated in a conspiracy in restraint of trade.

The evidence indicates that Marshall-Michigan cooperated with the plaintiffs until a series of contacts occurred with the First Wisconsin defendants. It is significant that both Marshall-Michigan and the First Wisconsin defendants were represented by attorneys from the same law firm. These attorneys arranged the meetings and were instrumental in the various negotiations which ultimately led to the acquisition of the Juneau Square Project. These same attorneys were also intimately aware of the respective positions of both parties. Both were clients of the firm and were in a position to gain from the elimination of the plaintiffs. As the parties were not in an adversary position but were cooperating in this regard, it is logical to assume that they were fully advised of the situation before reaching any agreement, if in fact an agreement was reached.

The subsequent actions of Marshall-Michigan tend to support this view. Marshall-Michigan was not only not cooperating, it was doing its best to eliminate the plaintiffs. Those actions included the commencement of a foreclosure action and an attempt to interfere with the rental payments of the project. Once the plaintiffs were ousted from the project, Marshall-Michigan promptly sold its interest to the First Wisconsin defendants.

The Court is not unaware of the fact that the various witnesses for Marshall-Michigan denied that they had participated in a conspiracy to eliminate competition. The jury obviously attributed little weight to these denials and found the circumstantial evidence to be more persuasive. The Court is not in a position to say that these denials were so persuasive as to warrant judgment notwithstanding the verdict.

The sufficiency of the evidence is challenged in another respect. The defendants contend that there is little or no evidence of injury or prejudice to the public interest and without such proof, it is asserted that the plaintiffs failed to prove that the conspiracy resulted in an unreasonable restraint of trade.

It is well settled that although section 1 of the Sherman Act prohibits "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States," only those contracts, combinations, or conspiracies which are found to *unreasonably* restrain competition are prohibited by the Act. *Standard Oil Co.* v. *United States,* 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1910); *United States* v. *American Tobacco Co.,* 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663 (1910). Some proof of the unreasonableness of the restraint is therefore necessary to distinguish those restraints which are incidental or ancillary to normal business transactions.

The burden of proof in this regard depends on the nature of the anticompetitive conduct employed by the alleged violations of the Act. Certain practices such as price fixing, *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); market allocation, *Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951); concerted

refusals to deal (group boycotts), *Fashion Originators' Guild* v. *Federal Trade Comm'n,* 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941); and some tying arrangements, *International Salt Co.* v. *United States,* 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947); are considered to be so inherently anticompetitive that they are deemed to be *per se* illegal. No further inquiry into the reasonableness of the restraint is required. The Court, however, has never adopted the position that a *per se* violation occurred in the case at bar.[15]

In cases involving conduct which is not inherently anticompetitive, proof of the unreasonableness of the restraint is required to establish a violation of the Act. The reasonableness of any restraint invariably involves questions of relation and degree and an inquiry into, *inter alia,* the particular business, the nature of the restraint and its effect, the reason for the restraint, and the purpose or end to be obtained thereby. *Sugar Institute, Inc.* v. *United States,* 297 U.S. 553, 56 S.Ct. 629, 80 L.Ed. 859 (1936); *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918).

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[15] Two *per se* theories were advanced by the plaintiffs. The plaintiffs first urged the Court to adopt the theory first announced in *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.,* 57 F.2d 96 (1st Cir. 1932), to the effect that a conspiracy to destroy a competitor through the use of unfair methods of competition is a *per se* violation of the Sherman Act. This theory has never been approved by the Supreme Court, nor has it gained acceptance in most circuits. In fact, there is some doubt as to whether it is still good law in the First Circuit. *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.,* 508 F.2d 547 (1st Cir. 1974). This Court is of the opinion that the reasonableness of the restraint should be submitted to the jury in such circumstances.

The plaintiffs also argued that a *per se* illegal boycott was involved in the case at bar. There is no evidence in the record to support this theory.

As a part of the proof of the unreasonableness of the restraint, there is at present some disagreement as to whether any proof of public injury is required. It is of course clear that proof of public injury is not required in cases involving *per se* violations of the Act. *Continental Co.* v. *Union Carbide,* 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962); *Radiant Burners, Inc.* v. *Peoples Gas & Coke Co.,* 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). The disagreement arises with respect to non-*per se* cases. *See, e. g., Syracuse Broadcasting Corp.* v. *Newhouse,* 295 F.2d 269 (2nd Cir. 1961) (Public injury not required). *Contra, Kestenbaum* v. *Falstaff Brewing Corp.,* 514 F.2d 690 (5th Cir. 1975); *Lamb Enterprises, Inc.* v. *Toledo Blade Co.,* 461 F.2d 506 (6th Cir. 1972).

This disagreement has resulted from certain language in *Radiant Burners* and dictum in *In Re McConnell,* 370 U.S. 230, 231, 82 S.Ct. 1288, 1290, 8 L.Ed.2d 434 (1962), to the effect that "the right of recovery of a plaintiff in a treble damage antitrust case does not depend at all on proving an economic injury to the public." *See, also, Switzer Brothers, Inc.* v. *Locklin,* 297 F.2d 39, 47 (7th Cir. 1961).

An analysis of this limited and somewhat unclear authority on the subject persuades the Court that in cases involving non-*per se* violations of the Act, the private litigant must at the very least prove that restraint "tends or is reasonably calculated to prejudice the public interest." *Rogers* v. *Douglas Tobacco Board of Trade,* 266 F.2d 636, 644 (5th Cir. 1959). Both *Radiant Burners* and *Klor's,* the principal authority relied upon by opponents to the public injury requirement, involved *per se* violations. In both instances, the Court, while not expressly relying

upon the *per se* distinction, emphasized the nature of the restraint employed in each case.

> The Court [in *Standard Oil Co.* v. *United States,* supra] recognized that there were some agreements whose validity depended on the surrounding circumstances. It emphasized, however, that there were *classes of restraints* which from their "nature or character" were unduly restrictive, and hence forbidden by both the common law and the statute. 221 U.S. at 58, 65 [31 S.Ct. [502] at 515]. *As to these classes of restraints,* the Court noted, Congress had determined its own criteria of public harm and it was not for the courts to decide whether in an individual case injury had actually occurred. Id., at 63-68 [31 S.Ct. [502] at 517-518-519].
>
> Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. (footnotes omitted) *Klor's,* supra, 359 U.S. at 211-212, 79 S.Ct. at 709 (emphasis added).

Similar language is found in *Radiant Burners, supra,* 364 U.S. at 659-660, 81 S.Ct. 365. A reading of both cases indicates that public harm is presumed in those classes of restraints which are by their nature unduly restrictive. The Court has typically reserved such language for those restraints which are considered to be *per se* unreasonable.

This view is supported by the Court's subsequent decision in *Continental Co.* v. *Union Carbide, supra.* In that case, the Court distinguished *per se* violations of the Act.

> An error committed by the trial court, perhaps understandable because the trial preceded this Court's decision in *Klor's, Inc.,* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 [79 S.Ct. 705, 3 L.Ed.2d 741], was the "public injury" charge. Although petitioners pleaded a concerted refusal to deal with them by respondents, a price-fixing conspiracy, and an allocation of customers, all *per se* violations under § 1 of the Sherman Act,

> the court charged the jury that a conspiracy must be proved "which was reasonably calculated to prejudice the public interest by unduly" restraining trade, and which was intended "to injure the general public by" restraining trade. Under the rule stated in *Klor's* this charge was error. *Id.*, 370 U.S. at 708, 82 S.Ct. at 1415. (emphasis added)

In view of the *per se* distinction drawn in *Continental Co.* and the apparent rationale of both *Klor's* and *Radiant Burners,* the Court is unable to find any basis for the conclusion that proof of public injury is no longer required in cases involving non-*per se* violations of the Act.

The Second Circuit Court of Appeals is the only higher court to expressly eliminate the requirement of proof of public injury in a non-*per se* case. That decision relied upon *Radiant Burners* without further elaboration. *Syracuse Broadcasting Corporation, supra,* at 276-277. While similar language is found in *Switzer Brothers,* a decision rendered prior to *Continental Co.,* the Seventh Circuit Court of Appeals was confronted with *per se* violations of the Act, and the applicability of *Radiant Burners* was clear. 297 F.2d at 47. The Seventh Circuit has not addressed the issue in a case involving a non-*per se* violation of the Act. These decisions to the extent that they hold or indicate that *Radiant Burners* should be applied in the non-*per se* case are not persuasive.

As the Court understands it, the parties concede that proof of specific public injury is not required. The plaintiffs need only show that the restraint "tends or is reasonably calculated to prejudice the public interest." *Rogers, supra,* at 644. With respect to the trade of office rental space, the plaintiffs offered evidence to the effect that the defendants conspired to eliminate them as potential competitors. The defendants denied that they were so motivated, but the jury has found to the contrary. The Court, as noted above,

has reviewed the evidence and is unable to say that this finding was erroneous as a matter of law.

The evidence also revealed: that the elimination of the plaintiffs placed 142,000 square feet of office rental space in the hands of defendants and prevented the construction of an additional 300,000 square feet; that because of the location and quality of the office space possessed by defendants, the only real competition east of the river was the MGIC Plaza and the First Federal Plaza; that the rates subsequently set by the defendants were based on the limited competition in that area; and that Juneau Square East with more available office space than both the MGIC Plaza and The First Federal Plaza combined and its choice location would have been in a position to compete with the defendants. From this evidence, the jury could have inferred that as a result of the elimination of the plaintiffs and the interference with free and open competition, the defendants were able to charge higher rates for the rental of their office space. Although there is evidence to the contrary, there is at least some evidence that the restraint tended or was reasonably calculated to prejudice the public interest.

It is doubtful whether the jury actually considered this matter in arriving at its verdict. While the jury was instructed that the plaintiffs must prove that the conspiracy resulted in an unreasonable restraint of trade, no reference was made to the requirement that there be some proof of public injury. In light of the complexity of the instant case and the importance of this issue, the Court should have provided further clarification for the jury.[16]

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[16] The complexity of the evidence and the legal issues are discussed in part II of this memorandum and order. The Court's failure to instruct on the issue of public injury was taken into consideration in ruling on the motions for a new trial.

There is, however, no evidence of public injury with respect to the trade of "interstate finance." In fact, there is no evidence that the defendants even conspired to restrain this trade. It is readily apparent that the plaintiffs confused the means employed by the defendants—the interference with plaintiffs' efforts to obtain financing—with the end of the conspiracy which even under plaintiffs' theory of the case was the elimination of competition in the rental of office space. Defendants' motion for judgment notwithstanding the verdict must therefore be granted as to the claim that the defendants conspired to interfere with the trade of interstate finance.

II.

The defendants advanced several contentions in support of the motion for a new trial. It is urged that the verdict is against the weight of the evidence; that the damages awarded by the jury are excessive; and that prejudicial errors were committed by the Court and by plaintiffs' counsel.

The legal standards applicable to a motion for a new trial are unlike those for a directed verdict or for judgment notwithstanding the verdict. As explained in *Simpson* v. *Skelly Oil Co.*, 371 F.2d 563, 570 (8th Cir. 1967):

> Thus, the case should be examined, not in the light most favorable to the plaintiff, but according to the analysis and appraisal by the trial court of the weight of all the evidence considering also any other relevant factors. *Williams* v. *Nichols,* 266 F.2d 389, 393 (4th Cir. 1959).

Aside from the weight of the evidence, other factors to be considered are the overall setting of the trial, the character of the evidence, and the complexity or simplicity of the legal principles. The matter is ultimately within the sound discretion of the Court and as stated in 6A Moore's Fed.Prac. ¶ 59.08[5] at 59-160 (1971):

> The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside; otherwise not.

A review of the evidence reveals that the existence of the conspiracy is predicated in large part upon the various efforts on the part of the First Wisconsin defendants to somehow interfere with the financing for Juneau Square East. Without these overt acts, the conspiracy makes little sense in light of the fact that both Aetna and Marshall-Michigan granted two extensions to the plaintiffs in order to permit them to salvage the project. The theory is presumably that Marshall-Michigan granted the extensions with the knowledge that the First Wisconsin defendants would then interfere with any attempt to obtain the needed financing.

The circumstances surrounding the various loan transactions were set forth in some detail at the beginning of this memorandum and order. The only loan transactions which are in any way linked to the First Wisconsin defendants are those involving Metropolitan and New York Life. It is significant that in both instances, the contact was initiated by the prospective lender and not the First Wisconsin defendants. It is also significant that no witness from either Metropolitan or New York Life gave *any* indication that they were pressured by the First Wisconsin defendants to decline plaintiffs' loan application.

With regard to the Metropolitan loan application, the weight of the evidence including the testimony and contemporaneous documents of all of the individuals responsible for the loan decision, is that the Liek contact had absolutely no effect on Metropolitan. Moreover, there is no indication that anything that Liek said was inaccurate

and every indication that there were substantial business reasons for the declination. The plaintiffs in large part relied upon the Little contact and the subsequent loss of financing with New York Life in asking the jury to infer that the same thing occurred with Metropolitan.

This leaves the circumstances surrounding the Little contact as the most significant and the most damaging evidence of the existence of a conspiracy. Those circumstances indicate that: (1) the loan application was forwarded to the home office of New York Life with a favorable recommendation; (2) the matter came before the loan committee on May 5, 1971 but was withdrawn to permit further investigation into the financial strength of the participating bank; (3) Duncan then contacted Albert Little of the First Wisconsin for a credit check; (4) Little responded a few days later with a telephone call to Davey; (5) Davey made contemporaneous notes of the conversation in the form of a memorandum which was forwarded to all of the members of the committee; (6) the committee met again on May 19, 1971 and the loan application was rejected by a vote of 5-1; and (7) the principal reason for the declination as testified to by members of the committee and as documented by the contemporaneous minutes of the meeting was that the participating bank was found to be unqualified.

There were two principal areas of contention surrounding the loss of financing with New York Life. The first was the accuracy of the Davey memorandum which purported to incorporate the substance of a conversation with Little. The second was the impact of the report on the loan committee. With respect to the accuracy of the report, there was considerable disagreement as to the contents as well as to whether Davey accurately recorded the

conversation. Little, Lett, and Dickens all gave varying explanations for Little's reference to the possible diversion of funds by the plaintiffs. These explanations were confusing and at times inconsistent. There is little or no evidence that the plaintiffs actually diverted any funds without the knowledge of the bank. It would appear that the entire matter was fabricated or that some misunderstanding or possible failure of communication occurred between the parties. Little significance was apparently attached to this alleged diversion because the bank subsequently went on to loan substantial sums of money to these same plaintiffs. Of significance at this point on the issue of intent is whether Little actually *believed,* however inaccurate, that the plaintiffs had diverted funds and not whether the plaintiffs had, in fact, previously diverted funds.

Aside from this confusion surrounding the intent and knowledge of Little at the time the report was made, there is considerable disagreement as to the *impact,* if any, that the report had on the loan committee. The testimony of the loan committee members was that the declination was based on the insufficient size of the participating bank. In fact the weight of the evidence indicates that the possible mishandling of funds was not a factor in the loan rejection. Some of the members of the committee could not recall whether the mishandling of funds was even discussed at the meeting. The overwhelming evidence indicated that the concern of the committee was the Midland bank. The fact that one of the committee members voted *against* the rejection also indicates that the integrity of the Juneau Square developers was not challenged. If the credit report was as devastating as suggested by the plaintiffs, it is logical to presume that the vote would have been unanimous.

The only evidence to the contrary is a subsequent memorandum which lists the mishandling of funds as one of two reasons for the loan rejection (PX 383). Lutz is the apparent source of this information. Lutz, however, testified that the reasons for the committee's decision were the complexity of the transaction and the financial strength of Midland.

The weight of the evidence is not the only matter of concern with respect to the loss of the New York Life loan application. In two instances the Court permitted the plaintiffs to introduce hearsay evidence of a prejudicial nature. The first instance occurred while plaintiff Jack Moertl was on the stand. Moertl was permitted to testify about a conversation he had with Jack Cisco, an employee at Baird & Warner. Cisco purportedly stated the following:

> Your New York Life financing is dead. It has been shot down. . . . Someone has given a credit report to New York Life Insurance Company that typifies you as crooks. We are told that we could just as well have sent Al Capone for a loan to New York.

When Moertl asked Cisco to explain what he meant, Cisco replied:

> Moertl, if you can't kill a project, you kill the developers. . . . [You] and Mr. Spoden have been painted as crooks and . . . the financing is dead (Tr. 1779-80).

Moertl then asked Cisco where this report came from.

> You should know full well where it came from. It came from the outfit that is building a building next door to you, the First Wisconsin Bank of Milwaukee. (Tr. 1781)

The Court admitted this testimony over the strenuous objections of the defendants upon the ground that it was not admitted for the truth of the matters asserted therein (Tr. 1775). The Court erred in this regard.

The impact of Little's contact with New York Life as noted above is a pivotal issue in the case. Moertl was in effect permitted to characterize a conversation with Cisco who was repeating a conversation that he had had with some unidentified source. There is no indication that Cisco or the person who related the story to him had personal knowledge of the contents or the impact of the Davey memorandum. Several levels of hearsay are clearly involved.

Although not admitted for the truth of the matters asserted therein, plaintiffs' counsel repeatedly emphasized this "characterization" of the evidence. For example, the cross-examination of Holscher elicited the following questions (Tr. 7760-7762):

> Q. That's a sophisticated way of a sophisticated banker telling a lender off in New York these people are crooks isn't it?
>
> • • •
>
> Q. Isn't it a fact, Mr. Holscher, that it takes quite a bit of thought to draft a report that can kill a project by killing the developers in the eyes of the lender and still hope to avoid libels and slanders, takes a lot of work, doesn't it?

And the cross-examination of Little elicited the following question (Tr. 9597):

> Q. That is a very sophisticated way of killing a loan, isn't it, Mr. Little, isn't it?

This hearsay testimony was at odds with the weight of the evidence and played a significant role in plaintiffs'

attempt to establish the existence of a conspiracy. The Court is therefore unable to say that its admission was harmless error.

The second instance of hearsay evidence of a prejudicial nature occurred when the Court permitted the plaintiffs to introduce the Lutz-Duncan memorandum of May 21, 1971, into evidence (PX 408). This memorandum was relied upon to support plaintiffs' theory that the First Wisconsin defendants were attempting to interfere with the New York Life loan application. The memorandum is several levels of hearsay and reads in pertinent part as follows:

> I learned from Regional Officer Wilford that he had a discussion with Baird & Warner regarding our declination of the subject case. He was told by our correspondent that they had been called by the First Wisconsin Bank, apparently to determine whether the applicants, or anyone associated with them, had any "clout" with New York Life.
>
> They apparently made it clear to Baird & Warner that they didn't want this building built—apparently because it would interfere with the timing of the leasing in their proposed building. Our correspondent conveyed to Joe Wilford the feeling that there were veiled intimidations along the lines that First Wisconsin would use their best efforts to delay or interfere with the construction of this building.

The memorandum was admitted under the business records exception to the hearsay rule. Fed.R.Ev. 803(6). This rule states that such records are admissible "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The lack

of trustworthiness and the prejudicial nature of this memorandum are self-evident.[17]

Of equal concern to the Court is the overall setting of the trial and the complexity of the evidence and the legal principles submitted to the jury. The plaintiffs were permitted to proceed at their own pace; the presentation of plaintiffs' case lasted for thirteen weeks. During this period, the jury was inundated with numerous exhibits and extensive testimony of a background nature. The plaintiffs did not reach the relevant period—the period of the actual conspiracy—until the second or third week of trial.[18] The plaintiffs had originally led the Court to believe that the entire trial would last four to six weeks.

By the time the plaintiffs rested, the Court's trial calendar was in shambles. All the trials previously scheduled for the summer and early fall had to be canceled. Of par-

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[17] After drafting this initial memorandum, Lutz investigated the matter and concluded that:

> The proposed joint venture and mortgage loan involving Juneau Square and Midland National Bank in Milwaukee resulted in some alleged statements being made by Dick Krause to our Manager Faulkner who quite properly relayed them to Regional Officer Wilford who referred them to the Home Office. The matter was serious enough to warrant checking the information out with Mr. Krause. This resulted in a conference call involving Fred Duncan and myself, during which call Mr. Krause said there was a misunderstanding—*that the two officers of First Wisconsin Bank were simply interested in knowing whether the applicants were actually seeking a loan,* etc. etc. (PX 406) (emphasis added).

[18] The absence of any semblance of a final pretrial report also contributed to the length of the trial. The Court was unable to obtain a stipulation of uncontested facts or a reasonable statement of the contested issues in the case. The parties will be ordered to meet and prepare an acceptable report prior to the second trial.

ticular concern was the backlog of criminal trials. In order to comply with the dictates of the Speedy Trial Act, the Court was forced to establish time limitations. As a result, the defendants were pressured to complete their respective cases in little more than three weeks. The impact of this unfortunate set of circumstances on the jury and the defendants cannot be lightly dismissed.[19] A new trial with reasonable time limitations on all parties would obviate this problem.

During the lengthy presentation of plaintiffs' case, the jury was confronted with an incredibly complex set of circumstances spanning the better part of ten years. Much of the testimony and the various exhibits involved large scale commercial loan transactions and the legal maneuvers of the parties in two foreclosure actions. This complexity was compounded by the fact that evidence was offered under a variety of legal theories. The plaintiffs sought to establish that the defendants monopolized office space and conspired to restrain the trades of downtown commercial office space *and* interstate finance.

At the close of the evidence, the jury was asked to weigh this incredibly complex set of circumstances and apply it to the two legal theories advanced by the plaintiffs under

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[19] The Court has considerable discretion with respect to the imposition of time limitations under Rule 611 of the Federal Rules of Evidence.

> (a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

The only regret that the Court has is that reasonable time limitations were not established at the outset of the trial.

section 1 of the Sherman Act. While antitrust actions tend to be by their very nature somewhat complex, the instant case was complicated by the limited evidence of anticompetitive impact and motive on the part of the various defendants. The Sherman Act is directed at unreasonable restraints on competition and is not a panacea for all wrongs. *Cf. Harrison* v. *Prather,* 435 F.2d 1168 (5th Cir. 1970). In view of the complexity of the evidence and the legal principles, the possibility of jury confusion cannot be dismissed as idle speculation. A new trial limited to the single restraint of trade claim would remove much of this confusion.

Further confusion resulted from plaintiffs' proof of damages. The case was tried on the theory that the "project" was injured by the antitrust conspiracy. The plaintiffs were of the opinion that it was of no concern to the defendants how the money was divided by the various parties in interest. The difficulty with this view is that the project is of no legal significance and is not a person within the meaning of section 4 of the Clayton Act. In order to recover, each plaintiff is required to prove that he was injured by the antitrust conspiracy. The defendants are entitled to challenge the standing, causation, and amount of damages awarded to each plaintiff. If there was no factual dispute in any of these areas, the plaintiffs should have moved for a court determination of the issue prior to submission to the jury.

In any event, after having heard the evidence from a project viewpoint, the jury was suddenly confronted with a series of questions as to the damages suffered by each plaintiff. In closing argument, plaintiffs' counsel attempted to cure this deficiency by urging the jury to award nominal damages to each of the individual plaintiffs. Although

the jury acquiesced in this request, the possibility of duplication and confusion remains. A new trial will eliminate this problem.

The damage claims of Wil-Ten are also somewhat vague and confusing. It is readily apparent that the wrongful elimination of competition can result in injuries to shareholders, creditors, or officers and employees of the injured corporation or to business entities which depend on the business of the injured corporation. Section 4 of the Clayton Act has traditionally been construed to deny standing to these parties upon the ground that they are not within the "target area" of the conspiracy, *i. e.*, their injuries are considered to be remote or derivative in nature in the sense that they occur as a result of the fact that another party was directly injured by the conspiracy. *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2nd Cir. 1971); *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F.2d 190 (9th Cir. 1964); *General Bev. Sales Co.-Oshkosh* v. *East Side Winery*, 396 F. Supp. 590 (E.D. Wis. 1975).

Wil-Ten's damage claims are in large part supported by the testimony of Jack Moertl. Moertl stated that the business operations of Wil-Ten came to a halt after the filing of the Aetna foreclosure (T. 2547); that this interruption resulted from the fact that the management of Wil-Ten became completely absorbed in the problems of the Juneau Square Project (T. 2547-2548, 2806); that the cash flow from Wil-Ten was diverted to keep the Juneau Square Corporation going (Tr. 2550); and that the credibility and credit worthiness of Wil-Ten were destroyed by the loss of the project (Tr. 2547-2551).

While judicial delineation of the target area and its application to a particular set of facts is not always an easy task, *Congress Building Corp.* v. *Loew's, Incorpo-*

rated, 246 F.2d 587 (7th Cir. 1957), Wil-Ten's damage claims appear to be remote or derivative in nature. To the extent that Wil-Ten advanced funds to Juneau Square Corporation, it is in the position of any other creditor to the injured party. The other injuries result from the fact that a "subsidiary" of Wil-Ten was the target of a conspiracy. Any injury to a project in Minneapolis, for example, would clearly be outside of that target area.

Aside from its position as a parent corporation, a position which would appear to be insufficient to confer standing, there is some confusion on the Court's part as to the interest of Wil-Ten in the Juneau Square Project. Wil-Ten argues that it was a co-developer and an operating lessee. There is some doubt on the Court's part as to whether either of these interests is sufficient to confer standing. The term "co-developer" is of dubious legal significance. Rather than grant judgment notwithstanding the verdict, the Court will permit the parties to address this issue prior to the second trial. For purposes of the instant motion, it is apparent that the Court erroneously permitted the introduction of much of the evidence with respect to the damage claims of Wil-Ten.

Other factors such as possible jury misconduct and the colorful argumentation of plaintiffs' counsel were also taken into consideration. In the final analysis, the Court is persuaded that all of these factors affected the deliberations of the jury and resulted in a miscarriage of justice. The Court is not unmindful of the time and effort expended by the plaintiffs or of the cost of a second trial, but these considerations must give way if justice is to be served. The defendants are also entitled to have their day in Court. For the reasons stated above, the motions of the First Wisconsin defendants and Marshall-Michigan for a new trial must be granted.

In light of the foregoing, there is no need to address the various motions which seek to amend the judgment or plaintiffs' motion for attorneys' fees. The only remaining matters before the Court are plaintiffs' motion for a new trial as to Aetna and Aetna's motion for the award of attorneys' fees.

III.

At the close of plaintiffs' case, Aetna moved for a directed verdict. At that time, the Court thoroughly reviewed the evidence in the light most favorable to the plaintiffs and concluded, with some reservation, that the plaintiffs had established a prima facie case.[20] In reaching this conclusion, the Court noted the highly circumstantial nature of plaintiffs' proof and that: (1) the record did not contain evidence of a *single* communication between Aetna and the First Wisconsin defendants during the relevant period, much less an agreement to restrain competition; (2) although Aetna may have had every intention of financing the third phase of the project and may have represented this fact to the plaintiffs, there were substantial business justifications for Aetna's subsequent refusal to continue the project; (3) there was no evidence indicating that Aetna was even aware of First Wisconsin's interest in the project during much of the relevant period; (4) Aetna agreed to two extensions which permitted the plaintiffs an opportunity to salvage the project; (5) and there was no evidence linking Aetna with the Liek or Little credit reports or any other purported attempt to interfere with the financing of Juneau Square East.

In light of the foregoing, the plaintiffs are hardly in a position to argue that as to Aetna the verdict is against the weight of the evidence. Moreover, the Court's decision to grant a new trial as to the remaining defendants was

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[20] See, footnote 2, supra.

in large part based on certain prejudicial rulings of the Court, the weight of the evidence with respect to the interference with the various loan applications, and the fact that the defendants were pressed to shorten their presentation. These factors, if anything, were also prejudicial to Aetna.

The Court is aware of the fact that the parties have not briefed this motion. The evidence and the contentions of the parties were, however, thoroughly briefed at the conclusion of plaintiffs' case. In view of the weight of the evidence in support of the verdict, there is little cause to explore the matter any further. For the reasons set forth above, the Court is of the opinion that plaintiffs' motion for a new trial must be DENIED.

IV.

After the verdict was returned, Aetna moved for the award of attorneys' fees upon the ground that the action was brought and prosecuted in bad faith. Aetna relies on the inherent power of the Court to award attorneys' fees to a successful party when that party's opponent has acted "in bad faith, vexatiously, wantonly or for oppressive reasons." *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 129, 94 S.Ct. 2157, 2165, 40 L.Ed.2d 703 (1974). *See, also, Walker* v. *Columbia Broadcasting System*, 443 F.2d 33 (7th Cir. 1971).

At the outset, it should be noted that there is some doubt as to whether the Court has the power to award attorneys' fees to a prevailing defendant in an antitrust action. In *Byram Concretanks, Inc.* v. *Warren Concrete Prod. Co. of N.J.*, 374 F.2d 649, 651 (3rd Cir. 1967), the Court noted the danger in adopting such a policy.

> We hold that in the absence of specific legislative authorization attorneys' fees may not be awarded to

> defendants in private antitrust litigation. Our conclusion is based on policy considerations reflected in the Clayton Act. It is well known that a primary objective of the private treble damage suit is to provide a means for enforcement of the antitrust laws in addition to Government prosecutions. The incentive which the prospect of treble damages provides for instituting private antitrust actions would be dampened by the threat of assessment of defendant's attorneys' fees and other costs as a penalty for failure.

This Court is unaware of any case in which a successful defendant has been awarded attorneys' fees in a private antitrust action. In the absence of any case authority or express statutory authorization, and in view of the strong policy considerations behind the private treble damage action, the Court is of the opinion that attorneys' fees should not be awarded to prevailing defendants.

Moreover, there is no indication that the action was brought or prosecuted in bad faith. Extensive discovery was conducted by the plaintiffs in an attempt to ascertain the circumstances surrounding the antitrust conspiracy. The fact that this discovery uncovered little *direct* evidence of Aetna's alleged participation does not warrant the conclusion that the action was brought in bad faith. The Court reviewed the evidence at the close of plaintiffs' case in chief and was unable to say that the circumstantial evidence proffered by the plaintiffs was insufficient as a matter of law. For the foregoing reasons, Aetna's motion for the award of attorneys' fees must be DENIED.

CONCLUSION

For the reasons set forth in this memorandum and order, it is,

ORDERED that the motions for judgment notwithstanding the verdict filed in behalf of Marshall-Michigan and the First Wisconsin defendants be and are hereby granted in part and denied in part;

ORDERED that the motions for a new trial filed in behalf of Marshall-Michigan and the First Wisconsin defendants be and are hereby GRANTED;

ORDERED that the motion for a new trial as to Aetna filed in behalf of the plaintiffs be and is hereby DENIED;

ORDERED that the motion for the award of attorneys' fees filed in behalf of Aetna be and is hereby DENIED;

ORDERED that the judgment entered in the above entitled action be and is hereby vacated;

FURTHER ORDERED that counsel for the remaining parties advise the Court within thirty days (30) as to their estimations of the time it will take to retry the case on the single restraint of trade issue so that the matter may be placed on the trial calendar.

District Court Memorandum and Order Denying Certification for Interlocutory Appeal

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JUNEAU SQUARE CORP., et al.,
Plaintiffs,

vs.

FIRST WISCONSIN NATIONAL BANK
OF MILWAUKEE, et al.,
Defendants.

Case No. 72-C-533

MEMORANDUM AND ORDER

There are several motions pending in this action which are ready for resolution.

The plaintiffs have requested that this court make a determination pursuant to 28 U.S.C. § 1292(b) so that an appeal of the order of July 29, 1977 may be taken at this time. Section 1292(b) states in relevant part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

Several issues are raised by the plaintiffs which they feel warrant certification at this time. The first issue pertains to that portion of the July order which granted a partial judgment notwithstanding the verdict. Although not specifically delineated in their brief, the plaintiffs

raise three issues on this point: First, the rejection by the Court of the *per se* antitrust violation theory announced in *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir. 1932), second, the ruling by the Court that in the absence of a *per se* violation the plaintiff was required to present proof of public injury, and, third, the finding by the Court that no proof of public injury was presented in this case with respect to the trade of "interstate finance."

The First Circuit announced a *per se* violation in *Pick-Barth.* They stated:

> To constitute an offense under section 1 of the Sherman Act it is not necessary, if a conspiracy is proven, the purpose and intent of which was to eliminate by unfair means a competitor in interstate trade, to show that the public was affected, and to what extent.

This theory has been strictly construed to apply only in the situation in which one competitor seeks to eliminate another competitor from the trade in which both are engaged. *See, Tower Tire & Auto Center, Inc.* v. *Atlantic Richfield Co.*, 392 F. Supp. 1098 (S.D. Tex. 1975) and cases cited and discussed therein: *Van Dyke Ford, Inc.* v. *Ford Motor Company,* 399 F. Supp. 277 (E.D. Wis. 1975). The basis of the theory is the proposition that by using unfair methods of competition with an intent to eliminate a competitor the actor necessarily unreasonably restrains competition in the trade in which both competitors are involved.

Even if the Court were to adopt the *Pick-Barth* rationale it would not change the result of the Court's order granting a judgment notwithstanding the verdict with respect to the trade of interstate finance. Under the theory of the case set forth by the plaintiffs, the defendants were not seeking to eliminate a competitor in the interstate trade of finance. The *Pick-Barth* theory does not extend

to this aspect of the case. Neither *Pick-Barth* nor its logical consequences can be cited for the proposition that, assuming the use of unfair methods and the intent to eliminate the plaintiffs as competitors in the interstate trade of office rental space that the defendants necessarily unreasonably restrained the trade of interstate finance.

The Court would conclude, therefore, that this issue is not a proper one for certification because it does not involve a controlling question of law as to which there is substantial ground for difference of opinion.

If *Pick-Barth* has any applicability in this case, it pertains solely to a restraint of the interstate trade of office rental space. Certification of this issue *alone* would not materially advance the ultimate termination of the litigation. Resolution of the viability of the *Pick-Barth* in this circuit, regardless of the outcome, would not affect this Court's order granting a new trial. It would only delay the commencement of the new trial.

The second issue raised is the Court's ruling that in the absence of a *per se* violation, proof of public injury is required. The Court has found that sufficient proof of public injury to the trade of office rental space was presented at trial. It specifically declined to grant a judgment notwithstanding the verdict to the defendants on this issue. The order then affects only the action as it pertains to a restraint of interstate finance and has no affect on this Court's order for a new trial.

The Court's prior opinion sets forth its rationale for the decision in question. While the Court would admit that the issue is not free from doubt and is subject to a difference of opinion, it cannot say that certification at this time would materially advance the ultimate termination of this litigation. Since the issue does not bear on the Court's order for a new trial, resolution of the issue by the court of appeals at this time would only delay the litigation.

The third issue raised pertains to the Court's review of the evidence of public injury with respect to the trade of finance. The Court concluded that there was none. The plaintiffs argue to the contrary:

> Moreover, the tendency to prejudice the public interest existed in this case as a matter of law: the elimination of the principal competition for the First Wisconsin, on the facts described in the court's decision, makes the tendency to prejudice the public interest an inescapable consequence of the conspiracy found by the jury. Plaintiff's brief at page 5.

The plaintiffs have failed to distinguish between the two trades which they contend are involved. The argument recites the theory of the *Pick-Barth per se* violation. If applicable at all, it relates not to the trade of finance but of rental office space. This issue is unsuited for certification as discussed above.

The remaining issues raised by the plaintiffs on their motion for certification pertains to the Court's decision in granting the defendants a new trial. Several arguments are advanced. The plaintiffs attack different portions of this Court's order and contend that it is either factually wrong or do not state grounds which can properly serve as a basis for granting the motion. In doing so they have overlooked the standards to be applied by the Court in dealing with the motion and the primary reasons advanced by the Court for granting the motion.

After summarizing the evidence in this case, the Court concluded that the verdict was against the weight of the evidence. This conclusion coupled with the decision that prejudicial error was committed in allowing Mr. Moertl to testify about a conversation he had with Mr. Cisco, and in allowing the introduction of the Lutz-Duncan memorandum, and amplified by the overall setting of the trial, the

character of the evidence, and the complexity of the legal principles involved, led the Court to the decision that to allow the verdict to stand would result in a miscarriage of justice.

The plaintiffs first attack the order for a new trial on the basis that the portion of the decision pertaining to the hearsay evidence is in error or is at least open to a difference of opinion. As proof thereof they rely on the Court's ruling at trial that the evidence was admissible and then a ruling in the July order that it was not.

The Court is of the firm conviction that its decision concerning the evidence in question in the July order is correct. No serious difference of opinion can exist to this ruling nor does the fact that this Court erred at trial in this regard lend credence to the plaintiffs' contention that a substantial ground for difference of opinion does exist.

The next argument for certification presented concerns the characterization of the evidence adopted by the Court in its July order. The plaintiffs argue that "it would be reasonable to disagree with the court's characterization," that the jury was not "required to view [the evidence] in a light so favorable to the defendants as the court adopted," and that the "jury must do the interpreting 'where motive and intent play leading roles and the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.' " The argument ignores the standard to be applied by the Court when facing a motion for a new trial.

> Thus on a motion for a new trial — unlike a motion for a directed verdict or for judgment notwithstanding the verdict—the judge may set aside the verdict even though there is substantial evidence to support it. *He is not required to take that view of the evidence most favorable to the verdict-winner.* 11 Wright & Miller, Federal Practice and Procedure: Civil § 2806 at 43-44.

The Court's prior opinion adopts a view of the case based on the evidence presented at trial. The plaintiffs have not argued to the contrary. The fact that the plaintiffs do not agree with the characterization or that the jury was not required to adopt it cannot serve as a basis for this Court to certify its order for appeal.

The remaining contentions of the plaintiffs are directed at specific factors which this Court considered in evaluating the motion for a new trial. In order to place these arguments in perspective a review of the standard utilized by the Court in ruling on the motion must be undertaken.

The standard applied by the Court is best stated by Professor Moore.

> The Court should not set the verdict aside as against the weight of the evidence merely because, if he had acted as trier of fact, he would have reached a different result. . . .
>
> The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts; and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside, otherwise not.

The ambiguity in the Court's instruction concerning the need for a finding of public injury, the pressure exerted by the Court in the latter stages of the trial to conclude the testimony, the problems created by the variance between the character of the proof of damages and the Court's instructions on damages, and the possible jury misconduct

were all considered by the Court in its decision to grant a new trial. These factors and others constitute the setting of the trial. They are not asserted as separate and independent grounds for a new trial apart from the Court's decision that the verdict was against the weight of the evidence.

In granting a motion for a new trial, the Court may not act merely as a thirteenth juror as stated above. The Court must exercise its discretion and take into consideration other factors. The admission of prejudicial hearsay evidence and those listed above were the factors which led the Court to its conviction that to allow the jury's verdict to stand would result in a miscarriage of justice.

What the plaintiffs are requesting then is a certification of a discretionary decision by this Court as to the view of the evidence which it adopted and the factors which it considered in evaluating the overall setting of the case. When reviewed by the appellate court, the decision will be reviewed for an abuse of this Court's discretion. As to the view of the evidence adopted by the Court, it is supported by substantial evidence in the record. Whether or not this Court abused its discretion in adopting this view is not in the Court's opinion subject to a difference of opinion. Similarly, the consideration of the other factors utilized by the Court in evaluating the motion and its characterization of these factors is reviewable for an abuse of discretion and the issue is not subject to a difference of opinion.

For the reasons stated above, the plaintiffs' motion for certification is DENIED.

Defendants Marshall-Michigan Company, Inc., First Wisconsin National Bank of Milwaukee, First Wisconsin Development Corporation, and First Wisconsin Corporation have also moved for authorization of an interlocutory

appeal pursuant to 28 U.S.C. § 1292(b) from that part of the order which denied the defendants' motion for judgment notwithstanding the verdict. That motion was conditioned on the Court's granting the plaintiffs' motion to certify an interlocutory appeal and is now moot.

Aetna Life Insurance Company and Aetna Casualty & Surety Company have moved for entry of judgment in their favor pursuant to Rule 54(b). That rule provides:

> (b) *Judgment Upon Multiple Claims or Involving Multiple Parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

In order to grant the motion, the Court must make a determination that "there is no just reason for delay." The Court has taken the position that the order granting the new trial as to other defendants in this case required the Court to vacate the judgment in favor of the Aetna defendants also. The last sentence of Rule 54(b) states as much and no authority to the contrary has been cited by these defendants.

The Aetna defendants present several arguments in support of their motion. They first contend that Aetna will be prejudiced in several respects by a denial of an entry of

judgment at this time. The prejudice they point out is twofold: (1) a confusing record on appeal based on the fact that two trial transcripts will be involved, and (2) the possibility that this Court might amend its order in accordance with the last sentence of Rule 54(b). The second argument presented is that any appeal with reference to Aetna will be "piecemeal" in any event since it will be based on the first trial while any other appeal will be based on the second trial.

The Third Circuit characterized the purpose of Rule 54(b) in *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360 (3rd Cir. 1975).

> (2) The rule attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review available at a time that best serves the needs of the parties. ". . . [T]he District Court is used as a 'dispatcher.' It is permitted to determine, in the first instance, the appropriate time when each 'final decision' upon 'one or more but less than all' of the claims in a multiple claims action is ready for appeal.
>
> * * *
>
> [O]rdinarily an application for a 54(b) order requires the trial judge to exercise considered discretion, weighing the overall policy against piecemeal appeals against whatever exigencies the case at hand may present. Indeed, the draftsmen of this Rule have made explicit their thought that it would serve only to authorize 'the exercise of a discretionary power to afford a remedy in the infrequent harsh case * * *.' It follows that 54(b) orders should not be entered routinely or as a courtesy or accomodation to counsel. The power which this Rule confers upon the trial judge should be used only 'in the infrequent harsh case' as an instrument for the improved administration of justice and the more satisfactory disposition of litigation in the light of the public policy indicated by statute and rule.

This characterization shows that entry of judgment under Rule 54(b) is to be used as an exception not as a rule. The "prejudices" which the Aetna defendants assert befall any defendant which a court orders excluded from a case in which there are multiple defendants. To adopt this as a criterion for ordering entry of judgment under Rule 54(b) would be to allow the exception to engulf the rule.

The argument pertaining to a "piecemeal" appeal does not withstand scrutiny. Following a retrial of the issues remaining in the case, an appeal will most likely be taken. There is no reason to assume, however, that as to the remaining defendants, that appeal will be limited to the second trial. It is quite likely that the losing party will attack the rulings unfavorable to them contained in this Court's order of July 29, 1977.

The Court is unable to make the required determination under Rule 54(b) and, therefore, denies the motion to enter judgment pursuant to that rule.

The only motion remaining is one to extend the time for transmitting the record on appeal in this case for a period of 90 days. The volume of the trial record in this case is sufficient reason to grant the motion. The motion will, therefore, be granted and the time for transmitting the record will be extended. The record must be transmitted to the court of appeals within 90 days of the date of filing the first notice of appeal.

Based on the foregoing, the motions to certify this Court's prior orders are DENIED. The motion for entry of judgment pursuant to Rule 54(b) is DENIED. The motion to extend time for transmitting the record on appeal is GRANTED.

SO ORDERED this 28th day of September, 1977, at Milwaukee, Wisconsin.

/s/ *Robert W. Warren*
United States District Judge

District Court Order Granting and Denying Defendants' Motions to Dismiss for Lack of Standing

UNITED STATES DISTRICT COURT
EASTERN DISRICT OF WISCONSIN

JUNEAU SQUARE CORP., et al.,
Plaintiffs.

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, et al.,
Defendants.

Case No. 72-C-533

MEMORANDUM AND ORDER

The remaining defendants in this action have filed a motion for summary judgment and a renewed motion for judgment notwithstanding the verdict. The motions are addressed to the standing of the plaintiffs to bring this action and to certain issues pertaining to the type of damages claimed.

In order to clarify the issues before the Court, a discussion of the proper scope of the inquiry into the plaintiffs' standing and into the nature of the damages claimed is appropriate.

This action is brought pursuant to section 4 of the Clayton Act, 15 U.S.C. § 15 (1970), and is based upon an alleged violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1970). The discussion will, therefore, be limited to standing under § 4. That section provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defend-

> ants resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The subject of standing in antitrust actions has received a considerable amount of attention by the federal courts. The decisions have concerned themselves primarily with the interpretation of the "business or property" and "by reason of" language contained in § 4. Two approaches to the problem were developed. Some courts followed an analysis referred to as the "direct injury" approach, while others concentrated on the "target area" approach. *See, In re Multidistrict Vehicle Air Pollution M.D.L. No. 31,* 481 F.2d 122 (9th Cir. 1973) and cases cited therein.

The Seventh Circuit has recently expressed its view on the appropriate approach to standing in *Illinois* v. *Ampress Brick Co. Inc.,* 536 F.2d 1163 (7th Cir. 1976), rev'd on other grounds, 431 U.S. 720 (1977).

The plaintiffs in *Ampress* were the State of Illinois and 700 local governmental entities in the Greater Chicago area, including counties, municipalities, housing authorities, and school districts. The defendants were manufacturers of concrete blocks. These blocks were sold to masonry contractors, who would submit bids to general contractors for the masonry portions of construction projects. The generals would in turn submit bids to the plaintiffs for the construction projects.

The plaintiffs contended that the defendants had conspired to fix the price of concrete blocks. They alleged that there were illegal overcharges contained in the price of the bricks sold to the masonry contractors. These overcharges, according to the complaint, arose by virtue of the price fixing conspiracy and were passed on to the plaintiffs.

The district court dismissed the claim on the basis of standing relying on the case of *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 315 F.2d 564 (7th Cir. 1973). "[A]s to *ultimate* consumers, their injuries are too remote and consequential to provide legal standing to sue against the alleged antitrust violator." *Illinois* v. *Ampress Brick Co., Inc.*, 67 F.R.D. 461 (N.D. Ill. 1975), *rev'd*, 536 F.2d 1163 (7th Cir. 1976).

The Court of Appeals reversed the lower court on the issue of standing. It was careful to point out that causation was a question of fact and not an element of standing. It was this point which distinguished the *Commonwealth Edison* case on which the lower court had relied.

The method utilized by the court to find standing was borrowed from the Ninth Circuit.

> To the extent that the district court held that these plaintiffs, as opposed to ultimate consumers in general, lack standing, we disagree. The plaintiffs here have alleged an injury in fact and are within the target area of the Sherman and Clayton Acts. They have shown that they were "within the area of the economy which [defendants] reasonably could have or did foresee would be endangered by the breakdown of competitive conditions." *Ampress Brick*, 536 F.2d at 1167, *quoting In re Western Liquid Asphalt Cases*, 487 F. 2d 191, 199 (9th Cir. 1973), *cert. denied sub nom Standard Oil Co.* v. *Alaska*, 416 U.S. 919 (1974).

The Seventh Circuit's decision in *Ampress* was reversed by the Supreme Court in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). The issue as defined by the Court was "whether the overcharged direct purchaser should be deemed for purposes of § 4 to have suffered the full injury from the overcharge." The majority of the Court concluded that the answer was yes. "[W]e decline to abandon the construction given § 4 in *Hanover Shoe*—that the

overcharged direct purchaser, *and not others* in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of the section. . . ." *Id.* at 729 (emphasis added). The plaintiffs, who were indirect purchasers and who "may have been actually injured by antitrust violations," were denied recovery because their business and property interests were not intended to be protected from the antitrust violation alleged. They were not within the class of persons intended by Congress to redress the violations asserted.

The Supreme Court refrained from categorizing the issue before it as falling within or without the question of standing. Footnote 7 to its opinion states:

> Because we find *Hanover Shoe* dispositive, here, we do not address the standing issue, except to note, as did the Court of Appeals below, 536 F.2d, at 1166, that the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4. *Id.* at 728, n. 7.

The analytical distinction referred to by the Supreme Court presents somewhat of an anomaly. While expressing no opinion on the circuit court's analysis of the plaintiffs' standing, the Court notes a distinction between the issue before it and the question of whether the injuries alleged were "too remote" for standing purposes. The Circuit Court opinion, however, states that "remoteness" is not an element of standing.

The Court of Appeals specifically rejected the standing approach utilized by the lower court, *i.e.*, an analysis of whether the injuries were too remote. It stated that causation is not an element of standing. The district court had used the term "remote" but it is clear from its opinion

that it viewed the issue in terms of causation, relying on *Commonwealth Edison* in which the Circuit Court, equating the two concepts, had stated: "[T]here was no direct proximate impact of the conspiracies on the consumers. The impact on them was remote. . . ." 315 F.2d at 567. It is equally clear that the Seventh Circuit recognized that the remoteness approach utilized involved the issue of causation. "The error in the defendants' reading of . . . *Commonwealth Edison* is that they view the failure to show that antitrust violations *caused* plaintiff's injury as an element of standing. It is not. . . . To the extent that the district court held that these plaintiffs, as opposed to ultimate consumers in general, lack standing, we disagree." 536 F.2d 1166-67 (emphasis added).

There would, therefore, appear to be a distinction between the definition of the term "remote" as used by the Supreme Court and the definition of that term as used by the Circuit Court. Nonetheless, it remains clear to this Court that, in this circuit at least, causation is not an element of standing.

Footnote 7 of the *Illinois Brick* decision also seems to imply that the question of which persons have been injured for purposes of section 4 is outside the issue of standing. Such an interpretation, however, would appear contradictory to other opinions dealing with standing. The inquiry undertaken in *Illinois Brick* was an effort to determine whether Congress envisioned that § 4 would provide a remedy to the plaintiffs in view of the nature of the damages asserted. *Hanover Shoe* was utilized in part as an aid in determining legislative intent based on its *stare decisis* effect. *See,* 431 U.S. at 736. This is precisely the same inquiry which the Supreme Court undertook in *Association of Data Processing Service Organizations, Inc.* v.

Camp, 397 U.S. 150 (1970), in order to determine the *standing* of the plaintiff to sue. *See also, Barlows* v. *Collins,* 397 U.S. 159 (1970).

> The "legal interest" test goes to the merits. The question of standing is different. It concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *Id.* at 153.

The Seventh Circuit's decision in *Ampress Brick* makes it clear that, in the opinion of that court, the question of whether the interest asserted by the plaintiff is protected by the antitrust laws is a question of standing.

> In private actions seeking to vindicate rights conferred by Congressional enactment, to establish standing the plaintiffs must show an injury in fact that is "arguably within the zone of interest to be regulated by the statute." *Id.* at 1164, *quoting Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150, 153 (1970).

The difference of opinion between the Circuit Court and the Supreme Court in *Illinois Brick* was on the question of whether the "business or property" interest asserted by the plaintiffs were intended to be protected by § 4 in light of the violation charged, *i.e.,* whether this class of plaintiffs were protected.

In view of the Supreme Court's statement that it expressed no opinion on standing in *Illinois Brick* and the discussion of the history of that case as set forth above, this Court would conclude that, in this circuit, the scope of the standing issue under § 4 is as it was set forth in *Ampress Brick* and includes the question of whether the business or property interests were intended to be protected from the antitrust violation alleged.

Before defining the scope of the standing issue and applying it to the facts of this case, mention must be made of one additional recent Supreme Court decision.

In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the Supreme Court was again confronted with an issue similar to that raised in *Illinois Brick*. The plaintiffs in that action challenged the acquisition of several bowling centers by the defendant, a large manufacturer of bowling equipment. The plaintiffs were competitors of the acquired centers. The injury alleged was that the plaintiffs had lost profits by virtue of the acquisitions because the acquired/competing centers would have gone completely out of business had not the defendant purchased them. The Supreme Court dismissed the damage claims.

The issue presented as defined by the Court was whether the plaintiffs had sustained an injury for purposes of § 4. As in *Illinois Brick*, the inquiry again centered on legislative intent. The emphasis had shifted, however. Instead of deciding whether the plaintiffs possessed a business or property interest protected by § 4 as in *Illinois Brick*, the inquiry in *Brunswick* was addressed to whether the *injury* to the plaintiffs' business or property was of the type intended to be remedied by § 4. The Court concluded that it was not. "Thus, respondents' injury was not of 'the type that the statute was intended to forestall.'" *Id.* at 487-88, *quoting Wyandotte Co.* v. *United States*, 389 U.S. 191, 202 (1967). The Court then concluded:

> We therefore hold that for plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from

> that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." *Id.* at 489, *quoting Zenith Radio Corp.* v. *Hazeltine Research,* 395 U.S. 100, 125 (1969).

Although the Supreme Court did not categorize its inquiry in *Brunswick* under the issue of standing, it is clearly encompassed within the standing criteria announced in *Association of Data Processing Service Organizations Inc.,* v. *Camp, supra.* The reliance on *Wyandotte* and the cases cited in support of it, place the analysis under the standing issue.

In *Wyandotte* the Supreme Court had occasion to analyze its prior decisions which allowed civil actions based on violations of penal statutes. The Court stated that the actions were allowed "[b]ecause the interest of the plaintiffs in those cases fell within the class that the statute was intended to protect, and because the harm that had occurred was of the type that the statute was intended to forestall." A closer parallel to *Camp* would be hard to find. Additionally, the Court cited several cases in support of the proposition that an antitrust plaintiff must assert damages of the type the statutes were intended to forestall. *See,* 429 U.S. at 488, n. 13. In two of those cases, the complaints were dismissed because of a lack of standing on the part of the plaintiffs: *Reinbert* v. *Atlantic Richfield Co.,* 471 F.2d 727 (10th Cir.), *cert. denied,* 411 U.S. 938 (1973) and *Kirihara* v. *Bendix Corp.,* 306 F. Supp. 72 (Haw. 1969).

It should be noted that the plaintiffs in *Brunswick* had standing to challenge the acquisitions in question at least for purposes of obtaining injunctive relief. This standing,

however, was predicated on § 16 of the Clayton Act which involves different standing requirements. *See, Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972); *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122 (9th Cir. 1973).

The Ninth Circuit Court of Appeals has construed the *Brunswick* decision as one on standing. Its position in this regard was made clear in *Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977), a decision rendered after both *Illinois Brick* and *Brunswick*.

The court, applying the "target area" approach to standing which it had adopted, stated that "[i]t is not enough to confer standing that plaintiff just prove some injury and show that this injury is within the affected area of the economy." What the plaintiff must show is that the injury it suffered "validate[s] the reasonable probability that a substantial anti-competitive effect upon the viability of competition in *that* market will flow from the condemned [activity]." *Id.* at 499 *quoting Kirihara* v. *Bendix Corp., supra.* The court then concluded:

> Applying the analysis of *Brunswick, Blankenship,* and *Kirihara, supra,* to the facts and pleadings of this case as set forth by Lenore, we hold that Lenore lacks standing to challenge Olympia's acquisition of Hamm's and to recover treble damages. *Id.*

The above analysis establishes that antitrust plaintiffs must allege an injury in fact to their business or property which is within the area of the economy which would be endangered by the breakdown of competitive conditions as a result of the antitrust violation. In order to fall within the area of the economy defined above, the business or property interest injured must fall within the protection of § 4, *Illinois Brick, supra,* or as stated in

Kirihara, supra, be "one of the components of the competitive infra-structure of the relevant market," and the injury sustained must be "of the type the antitrust laws were intended to prevent and that flows from that which make defendants' acts unlawful," *Brunswick, supra,* or as stated in *Kirihara, supra,* "validate the reasonable probability that a substantial anti-competitive effect upon the viability of competition in *that* market will flow from the condemned [activity]."

There are eleven plaintiffs to this action: Juneau Square Corp.; Wil-Ten Co., Inc.; Juneau Square Services, Inc.; Ralph W. Conway; Hal Bradley & Associates, Inc.; Emil Bartel; Anna Bartel; Vione Perry, as administratrix of the estate of Thomas H. Perry; Harold C. Smith, III, as administrator of the estates of Harold C. Smith, Jr. and Mildred B. Smith; Jack D. Moertl; and John F. Spoden. The defendants have attacked the standing of each plaintiff.

The plaintiffs allege that the defendants conspired to restrain the trade of office rental space in downtown Milwaukee by eliminating the plaintiffs as competitors in that market and preventing the completion of the Juneau Square Project through the use of unfair methods of competition. The conspiracy alleged was effectuated by restricting the plaintiffs' ability to compete in the relevant market. As alleged by the plaintiffs, the defendants conspired to place the plaintiffs in a position where they would not be able to continue competing in the market unless they obtained additional financing and could not complete the proposed expansion without additional financing. The defendants then, in furtherance of the conspiracy, interfered with the plaintiffs' ability to obtain the needed financing. As a result of this interference and concomitant restriction on plaintiffs' ability to compete, the plaintiffs were excluded from the market.

Based upon the above analysis of standing and the nature of the violation alleged, the Court concludes that in order to establish standing in this action each plaintiff must show that it was in the business of providing office rental space to the consuming public and/or was developing such a business in the relevant market, *i.e.*, downtown Milwaukee, and that its "commercial interest" in this regard was injured by the conspiracy. Additionally, the injuries complained of and resulting damages sought must flow from the restriction placed on the plaintiffs' ability to compete in that market.

Juneau Square Corporation is the principal plaintiff in this action and its standing will be analyzed first. Juneau Square Corp. became the owner of certain real estate involved in this action and the sole developer of the office buildings to be built thereon on May 21, 1962. It was on that date that Wil-Ten Co., Inc., of which Juneau Square Corp. was a wholly-owned subsidiary, transferred to the principal plaintiff herein all "right, title and interests in and to the land, plans and specifications, leases, agreements to lease, development and all other assets in the Juneau Square project." PX 79.

The Corporation then proceeded over the following years to acquire additional real estate and to develop the properties by constructing two office buildings on the block. These buildings have been referred to as Juneau Square North and South.

The construction of the first phase of the project, Juneau Square South, was substantially completed in July of 1963. The corporation then began renting the office space in this building while continuing to develop North. Transcript p. 840. Construction of the second phase, Juneau Square North, was completed sometime prior to the fall

of 1967 and tenants began to occupy this building during that period. Transcript p. 1027.

The development of the block was not complete, however. Plans were being developed and finalized for phase III, Juneau Square East.

There is sufficient evidence in the record of this case to the effect that Juneau Square Corporation was in the business of renting office space in the relevant market and was actively seeking to expand its business in that market.

The defendants have asserted basically three arguments against Juneau Square Corporation as a plaintiff to this action. These arguments are asserted against the remaining plaintiffs also, but since they are the only arguments raised against this plaintiff, they will be dealt with at this time.

The first argument borrows language from *Brunswick* to the effect that the antitrust laws are intended to protect *competition* and not *competitors,* and then concludes that since there has been no proof of public injury in this case, the injuries sustained by the plaintiff are "of no concern to the antitrust laws." The issue presented is addressed to the question of whether the restraint on competition alleged in this action is "unreasonable." The Court dealt with this issue in its memorandum and order of July 29, 1977 denying the defendants' motion for judgment N.O.V. and I decline to reconsider that order.

In their second argument, the defendants contend that the injuries sustained in this action were "entirely fortuitous." Paraphrasing a portion of the *Brunswick* opinion, they argue that under facts *similar* to those presented in this case, there would be no antitrust violation. In

drawing the analogy, however, the defendants have misconstrued *Brunswick*.

In the portion of the *Brunswick* opinion referred to, the Supreme Court, after explaining that the acquisitions therein were unlawful because of the defendants' "deep pocket," noted that the loss alleged by the plaintiffs would have occurred even if the acquired centers had been purchased by " 'shallow pocket' parents." The point being made was that the injuries did not flow from that which made the acquisitions unlawful. The fact of the existence of the antitrust violation was assumed in *Brunswick*.

The issue presented by the present motion on standing, as it relates to *Brunswick* is whether the injuries alleged flow from the antitrust violation. Although couched in the language of *Brunswick* and in terms of the type of the injuries alleged, the defendants' second argument is in reality addressed to the issue of whether the plaintiffs have alleged an antitrust violation and, in particular, whether the restraint involved was "unreasonable," not to the issue raised in *Brunswick*.

As noted above, the Court's position in regard to the reasonableness of the restraint has been discussed in an earlier opinion and will not be reconsidered here.

The third argument raised is addressed to the standing issue. At page 8 of their brief, the defendants state:

> Even if defendants in this case were found to have violated Section 1 of the Sherman Act, the only fact which could have made their conduct unlawful would have been an increase in the price of, or a decrease in availability of office space. Only those persons or firms who were denied office space or who were required to pay a higher rent—not plaintiffs, who were owners and developers of office space rather than tenants or prospective tenants—could thus possibly recover for the violation charged.

The question presented is whether the plaintiffs' business or property interests which were injured fall within the protection of § 4. More precisely stated whether a competitor in the office rental market is protected by § 4, in view of the violation alleged. The Court would conclude that the plaintiffs are so protected. Competitors have been found to be protected by § 4 in situations, similar to that presented in this case; where the activity complained of resulted in a restraint of trade by restricting the ability of the competitor to compete in the market. *See, Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Southern Concrete Co.* v. *U.S. Steel Corp.*, 535 F.2d 313 (5th Cir. 1976); *Cough* v. *Rossmor Corp.*, 487 F.2d 373 (9th Cir. 1973); *Fleer Corp.* v. *Topps Chewing Gum, Inc.*, 415 F. Supp. 176 (E.D. Penn. 1976).

There has been no challenge in this action as to whether the injuries alleged were to the "business or property" of Juneau Square Corp., *i.e.*, to their "commercial interests." *See, Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972). An injury in fact has been alleged and the Court has found that the plaintiffs fall within the protection of § 4. The only remaining issue is whether the damages sustained are "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." The Court finds that this test has also been met.

The injuries in this case flow from the restriction placed on the plaintiff's ability to compete in the relevant market. The damages which this plaintiff seeks are the lost profits and property from their business of renting office space. These injuries are of the type § 4 was intended to prevent. They are of the same character as the damages asserted in *Klor's Inc., supra.*

The inquiry into the factual background of this lawsuit as it relates to *Wil-Ten Co., Inc.,* as a plaintiff in this action is somewhat obscured by the way in which the plaintiffs approached damages at the first trial.

The plaintiffs assert the standing of Wil-Ten on the following bases:

(a) Wil-Ten itself was the owner, in active possession, of a substantial *property* interest in Juneau Square;

(b) Wil-Ten itself directly engaged in the *business* of developing the Juneau Square office building complex;

(c) Wil-Ten is in the *target area* and was *specifically and purposely "aimed at"* by the conspiracy;

(d) Wil-Ten was *directly* injured.

Prior to analyzing each of these points a comment must be interjected concerning the status of Wil-Ten as the sole stockholder of Juneau Square Corp. Although the plaintiffs state in their brief that they are not relying on this status to establish standing, they assert that it is sufficient to confer standing. They rely on *Perkins* v. *Standard Oil Co.,* 395 U.S. 642 (1969), for this proposition.

The plaintiffs have misinterpreted *Perkins.* The plaintiff in that case was the sole owner of several corporations which had been driven out of business by the defendants' act. The similarity between that case and the one presently at bar ends at that point, however. The antitrust violation alleged in that action was directed against the parent; it was Perkins himself who was forced to purchase the defendants' products at discriminatory prices. To the extent that the violation was also aimed at the subsidiary corporations and their claims were

being asserted, the standing of Perkins to raise those claims himself was not based on his status as their sole shareholder. Perkins had received assignments from the two corporations and asserted those claims as an assignee. *See, Standard Oil Co.* v. *Perkins,* 396 F.2d 809, 811 n. 1, 813-12 (9th Cir. 1968). The standing of Perkins, based solely on the fact that he was the sole stockholder of the two corporations was neither raised nor litigated.

The first portion of the Perkins' opinion deals with the second and third cause of action asserted in the complaint, *i.e.,* the assigned claims. The issue was whether those claims are encompassed by § 2 of the Clayton Act, not whether the proper party was asserting the claims. The second portion of the opinion deals with the individual claim of Perkins, the first cause of action. The plaintiffs have cited that section of the opinion which states:

> It is clear in this case, however, that Perkins was no mere innocent bystander; he was the principal victim of the price discrimination practiced by Standard. Since he was directly injured and was clearly entitled to bring this suit, he was entitled to present evidence of all of his losses to the jury. 395 U.S. at 649-50.

A reading of the circuit court opinion reveals that even here the court of appeals agreed that Perkins had suffered compensable injuries under section 4. The dispute was over the extent of the injuries which could be claimed in an antitrust action. The lower court had concluded that some of the damages claimed did not constitute "direct injury to business or property within the meaning of Section 4 of the Clayton Act." 396 F.2d at 815. The Supreme Court, however, held that once it was established that Perkins was "directly injured," the plaintiff

"was entitled to present evidence of all of his losses to the jury." This later statement is somewhat impaired, in the Court's view, by the *Brunswick* case discussed above. If the defendant in *Brunswick* had, after the period of increased competition which was found to have existed in that case, utilized its "deep pocket" to restrict competition and thereby inflicted a loss on the plaintiff, the later damages would apparently be compensable under § 4 but the "loss" which occurred during the period of increased competition would nevertheless be outside the scope of § 4 and not be compensable.

The Court would conclude that Wil-Ten's ownership as such of Juneau Square Corporation is insufficient to establish standing.

The plaintiffs' first basis for standing as to Wil-Ten is that it "was the owner, in active possession, of a substantial *property* interest in Juneau Square." As stated above, on May 21, 1962, Wil-Ten transferred all of its interests in Juneau Square to its wholly-owned subsidiary. Wil-Ten's property interest now referred to concerns the Vartanian property.

Plaintiff's exhibit 70 indicates that the Vartanian parcel was purchased by Juneau Square Corp. in November or December of 1965 at a price of $250,000. The corporation paid $50,000 in cash and gave the sellers a note and first mortgage on the property for the balance. Title to the property was taken in the name of Tennie Conway on August 26, 1966. The deed was recorded on September 20, 1966.

The following November, Tennie Conway deeded the property to Juneau Square Corp. which in turn executed a deed in favor of Wil-Ten which then executed a deed

in favor of Harold C. Smith and his wife. All of these deeds were executed on November 1, 1966. None of these deeds were recorded at that time.

On June 2, 1969, the deed from Conway to Juneau Square Corp. was recorded and Juneau Square Corp. granted a second mortgage on the land to Northwestern Elevator in the amount of $100,000. Subsequently, the deed from Wil-Ten to the Smiths was recorded on November 20, 1969 and the deed from Juneau Square to Wil-Ten on April 28, 1972.

The transfer of the property from Wil-Ten to the Smiths involved an exchange of land and a lease agreement between these parties. The agreement granted to Wil-Ten a lease on the Vartanian property for a period of 50 years. The rent was set at $5.00 per year to be increased to $22,500 per year on November 1, 1973. Wil-Ten retained the right to purchase the property during the term of the lease for $275,000.

It is this leasehold interest in the property and the right of repurchase which the plaintiffs contend establish Wil-Ten's standing.

The second basis for standing asserted is closely related to the first. The plaintiffs assert that "Wil-Ten itself directly engaged in the business of developing the Juneau Square office building complex." In this section of their argument, the plaintiffs state that Wil-Ten "invested" the profits from a sale of a building owned by Wil-Ten into the project and that it was obligated to the Vartanians on its note for the purchase of the Vartanian parcel. Additionally, they contend that Wil-Ten provided architectural and engineering services and shared its management, Mr. Moertl and Spoden, with Juneau Square Corp. in the development of the project.

The plaintiffs have taken the position that ownership of any type of interest in the "project" is sufficient to confer standing. Although the plaintiffs assert this position in favor of Wil-Ten's standing, they have not sought to establish damages measured by the diminished value of the ownership interest claimed. What they have sought as damages in reference to the Juneau Square Project is the profits which would have been made had the long-term financing been obtained and phase three completed. There has been no evidence presented which would establish Wil-Ten's right to any of these profits directly. Its only apparent right to these profits is by virtue of its ownership of Juneau Square Corporation. This ambiguity is compounded by the fact that the plaintiffs have never detailed which of the plaintiffs are asserting damages for loss of the profits from the three buildings. Whether or not Wil-Ten Co., Inc., is asserting these damages is unclear to the Court.

The evidence pointed to by the plaintiffs, which seeks to establish that Wil-Ten was in the business of developing office rental space in the Milwaukee market, is insufficient to establish that fact. The "investment" by Wil-Ten of the profits from the sale of a Minneapolis building is not explained. Whether this "investment" was a gift to its subsidiary or a loan or the purchase of an equity interest entitling Wil-Ten to a share of the profits is not explained.

Wil-Ten also asserts that it "gave the Vartanian family a note (as part of the purchase price on the Vartanian parcel) on which Wil-Ten was obligated directly to the Vartanians in the amount of $196,500." Plaintiffs' exhibit 70, however, states that the Vartanian parcel was purchased with $50,000 cash and $200,000 "paid by a note of Juneau Square Corp."

The Vartanians subsequently assigned this note to Marshall-Wisconsin, Inc., on May 23, 1972. The principal amount left owing at that time was $196,500. The import of this "investment", together with the tax payments on the parcel, is again left unexplained. The architectural and engineering services provided by Wil-Ten "to the project" must be viewed in a similar fashion. What interest Wil-Ten received in exchange for these services is simply unknown.

It would appear that each of the three instances of investments by Wil-Ten "in the project" constitute an infusion of capital into Juneau Square Corp. and that Wil-Ten retained no right of reimbursement from Juneau Square Corp. Such a state of facts cannot be interpreted as establishing Wil-Ten's business of developing office rental space in the relevant market.

The final point raised by Wil-Ten to establish that it was a co-developer of the project is that it shared its management with Juneau Square Corp. The management which Wil-Ten shared was in the persons of Mr. Moertl and Mr. Spoden who were also the principal operating officers of Juneau Square Corp. Whether these officers were working for Wil-Ten or Juneau Square Corp. or both at any particular time is an illusory concept. Additionally, there has been no evidence as to what interest Wil-Ten was to receive for sharing its management.

The difficulty presented by the above discussion is compounded by the damages asserted in this action. As noted above, damages for the diminished value of Wil-Ten's leasehold interest have not been asserted. Nor have damages, tied directly to the "investment" of the profits from the sale of the Minneapolis building or the shared management been asserted. Damages linked to the Vartanian note and the architectural and engineering services have

been asserted. These damages were grouped under a heading entitled "Wil-Ten Co., Inc., et al Notes and Debts Payable." Mr. Moertl characterized these debts as follows:

> These are Wil-Ten Co., Inc., and others. It's really a form of a limited partnership, that it's an association of interest that were grouped together at such time as foreclosure litigation really peaked, let's say, as of June 1, 1970, and represents the obligations that these—that Wil-Ten *and Juneau Square Corp.* owes as of that time. . . . This association or Wil-Ten Associates *assumed* these obligations. Trial transcript pp. 2517-18. (emphasis added).

It is not altogether clear exactly who is seeking recovery for these damages; Wil-Ten Co., Inc., Wil-Ten Associates, or Juneau Square Corp. The assumption of these liabilities by the Association has not been made clear to the Court.

Wil-Ten's third basis for standing is that it was within the "target area" and "aimed at" by the conspiracy. The argument presented in this section of the brief is based on the allegation that "Wil-Ten was in the business of producing office space for the very market in which the defendants sought to restrain competition." As stated above, this fact has not been established.

The final argument presented is that Wil-Ten was "directly" injured. This argument is one addressed to the issue of causation, which as discussed above, is not within the scope of standing.

The factual setting of this action as it pertains to Wil-Ten's standing to assert damages is far from clear. The nature and extent of its damage claims is also uncertain. Because of this ambiguity, the Court is simply unable, even at this late date, to conclude whether or not Wil-Ten has standing in this action. The Court will not, therefore, at

this time dismiss Wil-Ten as a plaintiff in this action for lack of standing. This issue will be left for trial.

While there is confusion concerning some of the damages claimed by Wil-Ten in this action, one area of damages and its basis is sufficiently clear to permit a ruling on standing.

Wil-Ten contends that its business of developing buildings for Mutual of Omaha and Eastman Kodak Co. throughout the country was injured by the conspiracy alleged in this action. Its position in this regard is set forth at pages 2539 through 2551. The plaintiff contends that its business in this regard was injured because its principal officers, Mr. Moertl and Mr. Spoden, were so occupied with the foreclosure actions begun against Juneau Square Corp. that they were unable to effectively manage the business of Wil-Ten. It is clear that these claims must be dismissed from this action.

The injury alleged in this damage claim is not to a commercial interest within the relevant market. Additionally, assuming that Wil-Ten has a commercial interest in the relevant market, the injury alleged does not flow from the restriction placed on its ability to compete in that market. Such a restriction does not naturally result in an inability to manage other commercial interests of the plaintiff and does not "validate the reasonable probability that a substantial anti-competitive effect upon the viability of competition in *that* market will flow from the condemned [activity]." *Kirihara* v. *Bendix Corp.*, 306 F. Supp. at 90. As such, these losses are of no concern to the antitrust laws.

Juneau Square Services, Inc. has also asserted standing to maintain a damage action pursuant to § 4 against the defendants. This plaintiff apparently held a lease on the gas station and parking garage located on the Juneau

Square block. The verdict form utilized at trial included individual questions as to each plaintiff regarding causation and damages. Juneau Square Services was not listed. Although the plaintiffs objected to the procedure of requesting separate damage findings for each plaintiff, they did not specifically object to the failure to include Juneau Square Services.

The damages claimed by this plaintiff are unclear. The plaintiffs presented evidence of the loss of profits which would have been realized had a proposed parking structure been built. They did not, however, identify which of the plaintiffs was claiming these damages. Apparently, these profits were to have gone to Juneau Square Services, Inc. after they had leased the new structure from Juneau Square Corporation. The arrangement in this regard, however, was not made clear at trial.

The plaintiffs' brief in opposition to the instant motion at page 23 indicates that the damages sustained to Juneau Square Services was the loss of its existing business not loss of future profits. No damage evidence of this type of injury was presented at trial, however.

Whether the Court considers the injury to be to this plaintiff's existing business or to its future business the result is the same. The Court must conclude that this plaintiff has no standing. It was not in the business of providing office rental space nor was it planning to enter the market. It had no commercial interest within the area of the economy threatened by the conspiracy. Juneau Square Services, Inc. will, therefore, be dismissed as a plaintiff to this action.

The standing of Ralph W. Conway; Emil and Anna Bartel; Vione Parry, as administratrix of the estate of

Thomas H. Perry; and Hal Bradley & Associates, Inc. will be considered together since their interests in this action are identical.

These plaintiffs purchased a percentage of the ownership of the real estate known as "Juneau Square North" and "Juneau Square South" in late 1965 and early 1966. The total percentage of all of these plaintiffs totaled 25 percent. Simultaneously with these purchases, the plaintiffs entered into identical contracts providing for a lease of the property purchased back to Juneau Square Corporation and an agency agreement with Juneau Square Corporation. These agreements were plaintiffs' trial exhibits 102 through 105.

These plaintiffs assert that they were joint venturers with Juneau Square Corporation in the two buildings identified above and as such were in the business of providing office rental space in the relevant market. If this fact can be established, their standing is identical to that of Juneau Square Corporation as it relates to the two buildings. An analysis of the contracts referred to above and the damages claimed by these plaintiffs is in order.

The lease agreement entered into between the plaintiffs and Juneau Square Corporation provided that the corporation was to receive a 50-year lease of all property purchased and a right to renew the lease for a period of 49 years. Rental payments on the lease were set at a figure equaling 10 percent of the purchase price paid by each plaintiff per year or 10 percent of "the net rental received during said twelve (12) month period from the tenants of [Juneau Square North and South]," whichever is greater.

The agency agreements provide for the formation of a joint venture for the purpose of "holding, administering and otherwise dealing with the ownership of [Juneau

Square North and South].'' Each plaintiff appointed Juneau Square Corporation as its agent ''for the joint venture in the holding, administering and otherwise dealing with the ownership of the property.'' The agreement then stated: ''All profits and losses arising from the ownership of the Property shall be shared in proportion to the respective fractional interest of each of the parties hereto.''

The standing analysis of these plaintiffs hinges on whether they are regarded as part owners of the business or mere lessors whose rentals were tied to the profits of the business.

Again the approach to damages utilized at the first trial obscures the issue. Exactly what damages these plaintiffs are asserting has not been made clear. The plaintiffs, as stated previously, simply sought to establish the lost profits for ''the project'' without specifying which of the plaintiffs were entitled to these profits. The rental payments due to the joint venturers does appear as an item of damages, but it appears as a compensable debt of Juneau Square Corporation rather than as damages owing to the joint venturers directly from the defendants. The plaintiffs' theory in this regard is somewhat curious and was stated by Mr. Moertl at pages 2529-28 of the trial transcript. The witness referring to the $250,000 investment by the joint venturers stated:

> We have always considered this as a debt and considered that it would be repaid; in fact, if we so chose we could have repaid it and not had them participate any further as investors; however, it was never our intention to exercise that right. We felt that it was at their option whether they would be repaid or stay in as investors.

Exactly who the "we" refers to is not clear. This testimony would appear to be in conflict with exhibits 102 through 105.

Additionally, any profits owing to the joint venturers would be limited to the profits from North and South. The lost profits of these two buildings alone, however, were not established. The damages for loss of profits for the two existing buildings and the proposed third building were treated as one unit without a breakdown as to each building.

The standing of a lessor whose tenants are the victims of an antitrust violation and whose rentals are tied to the profits of its lessee has received a considerable amount of attention by the federal courts. *See, Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971) and cases cited therein.

The Court need not analyze these cases nor attempt to reconcile them with the cases discussed earlier in this opinion in addressing the standing of these joint venturers. The Court would find that they are more than mere lessors of real estate.

The two agreements noted above when read in conjunction with each other sufficiently establishes, in the Court's opinion, that these plaintiffs were in the business of providing office rental space in the relevant market. They were entitled to a percentage of the profits in relation to their investment and were to share in any losses. They had the right to participate in managerial and administrative decisions through their agent appointed for that purpose. Although the issue is not entirely free from doubt, the Court finds that the joint venturers were in a business within the threatened area of competition. Their standing is identical to Juneau Square Corporation and their damage claims for lost profits are maintainable under § 4.

The standing of Harold C. Smith, III, administrator of the estates of Harold C. Smith, Jr. and Mildred B. Smith, is based on the Smiths' interest in the Vartanian parcel. Their interest in this land is set forth in plaintiffs' trial exhibit 111.

On November 2, 1966, the Smiths purchased the Vartanian parcel giving in return therefor some real estate which they owned near Mellen, Wisconsin. Simultaneously with this purchase, the Smiths leased back to Wil-Ten the Vartanian parcel "for a term not less than 50 years at an annual rental of $5.00 per year . . . which rental shall be increased to . . . $22,500 per year for the [Vartanian parcel], commencing November 1, 1973." Wil-Ten also retained a right to repurchase the land at a fixed dollar figure for the term of the lease.

The plaintiffs contend that the diminution in the value of this parcel to them is a compensable antitrust injury.

The Court has not been able to trace this alleged injury to any damage claim asserted at trial. It appears clear that the Smiths were not entitled to any of the lost profits and the damage claims in this regard are asserted by plaintiffs other than the Smiths. Nor does any other damage claim asserted relate to the Smiths.

There has been no evidence presented which would place the commercial interest of the Smiths within that area of the economy effected by the conspiracy to restrain the trade of office rental space. They were simply lessors of real estate. Even the status of their lessee, Wil-Ten Corp., as a victim of the antitrust violation, is, as discussed above, questionable.

The status of this plaintiff as a lessor of the property with a fixed dollar rental is insufficient to confer standing and he must be dismissed as a plaintiff in this action.

Calderone Enterprises Corporation v. *United Artists Theatre Circuit, supra; see Congress Building Corp.* v. *Loew's, Inc.*, 246 F.2d 587 (7th Cir. 1957); *Steiner* v. *20th Century-Fox Film Corp.*, 232 F.2d 190 (9th Cir. 1956).

The only remaining plaintiffs are Mr. Jack D. Moertl and Mr. John F. Spoden. As to the standing of these plaintiffs, their brief states:

> The plaintiffs have not pursued any claims on behalf of Jack D. Moertl and John F. Spoden individually because such claims are derivative, and they will be made whole by properly compensating Juneau Square Corp. and Wil-Ten. We therefore do not oppose the motion to dismiss Messrs. Moertl and Spoden as parties.

The motion to dismiss these plaintiffs will, therefore, be granted.

For the reasons stated above, the defendants' motions are granted in part and denied in part. Juneau Square Services, Inc., Harold C. Smith, III, Jack D. Moertl and John F. Spoden are dismissed as plaintiffs from this action. The motion to dismiss Wil-Ten Co., Inc., for lack of standing is stayed. The damage claims of Wil-Ten Co., Inc. relating to its commercial interest in projects other than the Juneau Square project are dismissed.

SO ORDERED this 22nd day of February, 1978, at Milwaukee, Wisconsin.

/s/ *Robert W. Warren*
United States District Judge

District Court's Bench Order Dismissing Plaintiff Wil-Ten for Lack of Standing

[Transcript of Second Trial at 1040-1041]

Now, gentlemen, I told you at the side bar, and I am convinced after Mr. Moertl's last answer to my question that Wil-Ten Co., does not have standing in this lawsuit. I think that comes as no surprise to plaintiff.

I indicated in the memorandum that we were unsure and we just left it open, but with that evidence, the only ownership equity that Wil-Ten had in Juneau Square Project, as we call it, is its ownership of Juneau Square and then I would, and do herewith enter an order to the effect that Wil-Ten Co. does not lack standing in this anti-trust suit and therefore that portions of the—well, first of all any testimony with respect to that we should disregard, and then I think that has an impact on this exhibit in terms of part four.

Now, I appreciate that, if I heard the last few questions, that apparently the plaintiffs contend that Juneau Square Corp was liable as a guarantor on this $111,000, but I would opine that I don't think that gives Juneau Square Corp a standing to assert that as a counterclaim in the lawsuit. A guarantor is not the maker, and unless you can convince me that there's some law to the contrary, I don't see how you can now say, well, we are liable on that note as a guarantor, therefore, we can assert it as a counterclaim here.

Order Denying Plaintiffs Permission to Litigate Certain Issues or to Amend Pleadings

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JUNEAU SQUARE CORP., et al.,
Plaintiffs,

vs. Case No. 72-C-533

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, et al.,
Defendants.

MEMORANDUM AND ORDER

Upon consideration of briefs submitted by the parties on March 20, 1978, the Court hereby enters the following order. The counterclaim of defendant First Wisconsin National Bank and the set-off in the "Seventh Defenses" in the answers of the defendants Marshall-Wisconsin Company, Inc. and Marshall-Michigan Company, Inc. have been previously determined by this Court. The Court's rulings in this regard remain unchanged by the order granting a new trial. The issues pertaining to the counterclaim and set-off will not, therefore, be relitigated at this trial. Paragraph four of the judgment previously entered in this action will be re-entered when all issues are resolved, and paragraph five will similarly be re-entered if appropriate.

Upon motion of the defendant, it is ordered that the plaintiff is precluded from relitigating the factual issue of any involvement of the Aetna defendants in a conspiracy in violation of 15 U.S.C. § 1. Additionally, the plaintiffs may not now assert that the Aetna defendants were controlled or manipulated by one or more of the remaining defendants. Such an assertion would, in the Court's opinion, require an amendment of the pleadings in this case. The defendants have objected to any such amendment, and the Court sustains that objection.

SO ORDERED this 22nd day of March, 1978, at Milwaukee, Wisconsin.

/s/ *Robert W. Warren*
United States District Judge

District Court Order Denying Plaintiff's Motion for New Trial (Second Trial)

JUNEAU SQUARE CORP., Wil-Ten Co., Inc., Ralph W. Conway, Hal Bradley & Associates, Inc., Emil Bartel, Anna Bartel, Vione Perry, as Administratix of the Estate of Thomas H. Perry, Plaintiffs,

v.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, First Wisconsin Development Corporation, First Wisconsin Corporation, Marshall-Michigan Company, Inc., Marshall-Wisconsin Company, Inc., Defendants.

Civ. A. No. 72-C-533.
United States District Court, E. D. Wisconsin.
July 31, 1979.

MEMORANDUM AND ORDER

WARREN, District Judge.

The plaintiffs commenced this action for treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, alleging that the defendants violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 and Section 7 of the Clayton Act, 15 U.S.C. § 18.

Subsequently, summary judgment was granted in favor of the defendants on the claim arising under Section 7 of the Clayton Act. The first jury trial in this case commenced on May 3, 1976. At the conclusion of plaintiffs' case, the Court granted defendants' motions for directed verdicts on the monopoly claims asserted under Section 2 of the Sherman Act. The Court also granted the motion for directed verdict filed on behalf of the Aetna Casualty & Surety Company.

The remaining claims—the restraint of trade violations asserted under Section 1 of the Sherman Act—were submitted to the jury at the close of the evidence.[1] The jury returned its verdict in favor of the plaintiffs on October 1, 1976. The jury found that the First Wisconsin defendants[2] and Marshall-Michigan Company, Inc. conspired to unreasonably restrain trade in the leasing, development, construction and operation of office rental space, and in the financing for the development of office buildings. The Aetna Life Insurance Company was the only defendant not found to be a member of the conspiracy. Judgment was duly entered on October 26, 1976.

Following the entry of judgment, various post-trial motions were filed with the Court. On July 29, 1977, after extensive examination and analysis of the facts and evidence presented, the Court granted the motion of the First Wisconsin defendants and defendant Marshall-Michigan Company, Inc. for a new trial in the interests of justice. The Court denied plaintiffs' motion for a new trial as to Aetna Life Insurance Company. *Juneau Square* v. *First Wisconsin National Bank of Milwaukee,* 435 F.Supp. 1307 (E.D.Wis. 1977).

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[1] Section 1 of the Sherman Act, 15 U.S.C. § 1 provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

[2] The First Wisconsin defendants consist of the First Wisconsin Corporation and its wholly-owned subsidiaries the First Wisconsin National Bank of Milwaukee, the First Wisconsin Development Corporation, and the Marshall-Wisconsin Company, Inc.

On March 20, 1978, a second jury trial commenced which lasted until June 15, 1978. On June 19, 1978, the jury returned a verdict in favor of the defendants. The jury found that the defendants did not enter into a contract, combination, or conspiracy with any other person which unreasonably restrained trade or commerce in the leasing of office rental space in the central business district of Milwaukee. On November 3, 1978, the Court entered judgment in this action.

On November 13, 1978, plaintiffs filed a motion for a new trial on all issues pursuant to Rule 59 of the Federal Rules of Civil Procedure. In support of their motion for a new trial, plaintiffs allege that the Court committed numerous prejudicial errors with respect to jury instructions, evidentiary rulings and other trial management decisions.

In order to facilitate an orderly discussion of plaintiffs' grounds for a new trial, the Court will address these grounds, under the following groupings, as utilized by the plaintiffs:

(1) Alleged instructional errors.

(2) Alleged errors in rulings on evidence.

(3) Alleged errors in trial management.

A timely motion for a new trial is addressed to the sound discretion of the trial court. *Montgomery Ward & Co.* v. *Duncan,* 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 (1940); *Schybinger* v. *Interlake S.S. Co.,* 273 F.2d 307 (7th Cir. 1959).

Rule 61 of the Federal Rules of Civil Procedure provides that:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of

the parties is grounds for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice.

The question of whether error is "harmless" is to be resolved in the context of the individual case. Where it appears that error in no way influenced jurors or had but a slight effect upon them, the verdict and judgment are to be affirmed. *International Merger & Acquisition Consultants, Inc.* v. *Armac Enterprises, Inc.*, 531 F.2d 821 (7th Cir. 1976). *See, also Kotteakos* v. *United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).

Thus, under rule 61, a new trial should not be granted unless the court finds that refusal to take such action is inconsistent with substantial justice. *International Merger & Acquisition Consultants, Inc.* v. *Armac Enterprises Inc. supra; Everett* v. *Southern Pacific Co.*, 181 F.2d 58 (9th Cir. 1950).

ALLEGED INSTRUCTIONAL ERRORS

Plaintiffs argue that the Court erred in instructing the jury that the antitrust laws were enacted "for the protection of competition, not competitors" and that the plaintiffs were required to show actual injury to competition.

The following instruction on restraint of trade was given by the Court:

> The anti-trust laws were enacted for the protection of competition, not competitors. The plaintiffs must, therefore, establish that the defendants' acts injured not only the plaintiffs themselves, but competition in the leasing of office rental in the central business district of the City of Milwaukee. (Tr. 10,578)[3]

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[3] Transcript citations, unless otherwise indicated, are to the transcript of the second trial which commenced on March 20, 1978.

The first sentence of this instruction is a direct quote from *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977), which adopted the phrase, "competition, not competitors" from *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). The Court's instruction was not a misstatement of the law.

In order to recover under the antitrust laws, a plaintiff must show "antitrust injury," that is, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc., supra* at 499, 97 S.Ct. at 697.

Merely showing that one was a competitor of the defendants and was injured is not sufficient to show an antitrust violation under the Sherman Act. Plaintiffs must also establish an injury to competition. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc., supra; Magnus Petroleum Co., Inc.* v. *Skelly Oil Co.*, 599 F.2d 196 (7th Cir. 1979); *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977); *Redwing Carriers, Inc.* v. *McKenzie Tank Lines, Inc.*, 443 F.Supp. 639 (N.D.Fla. 1977), *Aff'd*, 594 F.2d 114 (5th Cir. 1979). As the court stated in *Magnus Petroleum Co., Inc.* v. *Skelly Oil Co., supra* at 204, evidence showing that "the effect upon competition in the marketplace was substantially adverse" is also required.

Contrary to plaintiffs' assertions, this instruction did not add another element to be proved by plaintiffs. A reading of the instructions as a whole shows that the Court specifically set forth the three elements that plaintiffs were required to prove by a preponderance of the credible evidence. These elements were:

(1) that the defendants contracted, conspired or combined to restrain commerce;

(2) that such restraint was unreasonable;

(3) that as a direct and proximate result of such a conspiracy to restrain trade, the plaintiffs suffered an injury to their business or property. (Tr. 10,571-10,572)

The Court also instructed the jury as to the question of proof of harm to the general public immediately after the challenged instruction on competition. The Court stated that: "A restraint (of trade) is unreasonable if it tends or is reasonably calculated to prejudice the public interest." (Tr. 10,578)

Plaintiff also argues that they were deprived of any opportunity to argue to the jury with respect to the challenged instruction because the Court decided to insert this "competition, not competitor's" language from defendants' proposed instruction 19A after the close of final arguments.

At the beginning of the final day of argument, the Court informed the parties that it was withholding its decision of defendants' proposed instruction 19A and taking it under advisement. The Court gave serious consideration to the position of both parties and ultimately concluded that language from this instruction should be included in the final instructions given to the jury. Plaintiffs did not request that the Court rule on this proposed instruction prior to completion of their closing argument, although they did object to the instruction when the Court announced its decision.

The case cited by plaintiffs to support its position on this question, *Frederic P. Wiedersum Associates* v. *National Homes Construction Corp.*, 540 F.2d 62 (2d Cir. 1976), is clearly distinguishable from the facts of this

action. In *Weidersum,* the court refused to inform the parties of any of the instructions it intended to give the jury, even though defense counsel requested the court to do so. Certain defense contentions about issues in the case were rejected by the court during the trial, but the court then instructed the jury on these contentions. Furthermore, the court gave totally inconsistent and conflicting instructions and failed to winnow out the requested instructions which it intended to adopt from those which it intended to reject.

Under these circumstances, the Second Circuit Court of Appeals granted a new trial, noting that it is fundamental error to give instructions which are hopelessly confusing and which fail "to provide even the barest legal guideposts to aid the jury in rationally reaching a decision.' *Id.* at 66, quoting *McNello* v. *John B. Kelly, Inc.,* 283 F.2d 96, 102 (2d Cir. 1960).

In the present case, the Court finds that its augmenting of the restraint of trade instruction after the close of the final arguments did not fundamentally change the instruction or constitute prejudicial error requiring a new trial. *See, Garland* v. *Material Service Corp.,* 291 F.2d 861, 863 (7th Cir. 1961).

After careful consideration, the Court concludes that its restraint of trade instruction, taken in context, was not erroneous but a correct statement of the law. The addition of the "competition, not competitors" language after the close of final arguments did not constitute prejudicial error.

Plaintiffs contend that the Court erred in instructing the jury that it was irrelevant whether various acts of the defendants violated laws other than the antitrust laws.

Plaintiffs argue that the wrongfulness of specific acts done to accomplish a trade restraint is relevant in evaluating the defendants' conduct to ascertain whether a conspiracy exists and to determine whether the restraint of trade is reasonable.

In its instructions, the Court advised the jurors:

> During the course of the trial reference has been made to acts on the part of the various defendants and other persons that the plaintiffs claim were done as a part of a conspiracy to restrain trade, so as to injure plaintiffs in their business or property. You are to consider these acts, if you find they were indeed done by the defendants only if you also find that they were done in the course of and in furtherance of a conspiracy to violate the antitrust laws by unreasonably restraining trade. Whether or not these acts were violative of laws other than the anti-trust laws is irrelevant. If any of the defendants have committed any other wrongs and I do not suggest whether they have or have not, you should not consider the character of these acts under laws other than the anti-trust laws as I have defined and explained them in these instructions. (Tr. 10,586-10,587)

In this instruction, the Court explained to the jury that only those allegedly illegal acts done by the defendants in the course of and in furtherance of a conspiracy to violate the antitrust laws could be considered. Whether any of these acts also violated principles of tort law was not, in and of itself, determinative of an antitrust violation. Merely because a defendant's acts may have constituted a tort does not automatically make that defendant's acts violative of the Sherman Act.

This is what the Court instructed the jury. Such instruction was not erroneous.

Plaintiffs also argue that they were entitled to have this instruction on the illegality of defendants' acts as part of their theory of the case. It is clear that plaintiffs are entitled to have their theory of the case presented to the jury. *Florists Nationwide Telephone Delivery Network* v. *Florists Telegraph Delivery Assn.*, 371 F.2d 263 (7th Cir. 1967).

However, the Court gave the substance of the parties' theories when it outlined the contentions of each of the parties at the outset of the jury instructions. (Tr. 10,556) Plaintiffs also argued their theories to the jury regarding the defendants' allegedly illegal conduct during closing argument.

The Court's instructions were geared to guiding and aiding the jury in its evaluation of the vast amount of evidence presented. Plaintiffs' and defendants' theories of the case were set forth by the Court. Accordingly, the Court finds that it did not err in its instruction concerning the alleged illegal or unreasonable acts of the defendants.

Plaintiffs assert that the Court erred in failing to give plaintiffs' requested instruction 16 regarding unfair competition as a per se violation of the Sherman Act. Plaintiffs state that the per se illegality of using unfair and illegal methods to destroy a competitor is well-established in case law, citing *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir. 1932); *cert. denied*, 286 U.S. 552, 52 S.Ct. 503, 76 L.Ed. 1288 (1932) and related cases.

One problem with plaintiffs' position is that the Court considered and rejected plaintiffs' per se theories in the first trial and no new judicial authority has been presented

to change the Court's earlier decision. In its prior decision, the Court explained that the per se theory announced in *Pick-Barth* has never been approved by the Supreme Court nor has it gained acceptance in most circuits. The Court also pointed out that, in light of *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), there is some doubt as to whether the *Pick-Barth* rule is still good law. *See, Juneau Square* v. *First Wisconsin National Bank of Milwaukee, supra* at 1319.

Recent case law has also criticized the per se rule set forth in *Pick-Barth*. *See, Stifel, Nicolaus & Co.* v. *Dain, Kalman & Quail, Inc.*, 578 F.2d 1256 (8th Cir. 1978); *Northwest Power Products, Inc.* v. *Omark Industries, Inc.*, 576 F.2d 83 (5th Cir. 1978); *Redwing Carriers, Inc.* v. *McKenzie Tank Lines, Inc., supra.*

Moreover, the Supreme Court, in its recent decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568, expressed reluctance to extend per se rules under Section 1 of the Sherman Act. In light of the foregoing, the Court finds that it did not err in refusing to instruct the jury about unfair competition as a per se violation of the Sherman Act.

Plaintiffs argue that Aetna should have been included in the new trial and that the Court should not have instructed the jury that "you may not find that Aetna Life Insurance Company was a member of the alleged conspiracy." (Tr. 10,575) Plaintiffs state they should have been permitted to prove and argue that Aetna had been used and manipulated by the other defendants. The Court precluded this evidence by written order of March 22, 1978 on the ground that such an assertion would require an amendment of the pleadings.

Plaintiffs contend that their third amended complaint was improperly construed by the Court, "a fair reading of which leaves ample room for proof of control or manipulation of Aetna by the defendants." (Plaintiffs' brief in support of motion for a new trial, p. 8).

A reading of this complaint does not show allegations of use and manipulation of Aetna. Furthermore, to allow plaintiffs leave to amend this complaint after the commencement of the second trial and over five years after the initiation of this action would not have served the interests of justice.

With respect to the exclusion of Aetna from the second trial, Rule 59(a) of the Federal Rules of Civil Procedure specifically authorizes the granting of a new trial as to "all or any of the parties and on all or part of the issues."

The jury in the first trial found that Aetna was not a member of the conspiracy. In denying plaintiffs' motion for a new trial with respect to Aetna, the Court found that the verdict was not against the weight of the evidence. The Court noted, among other considerations, that the record contained no evidence of any communication between Aetna and the First Wisconsin defendants during the relevant period, much less an agreement to restrain competition and that there was no evidence indicating that Aetna was even aware of First Wisconsin's interest in the development during much of the relevant period. The Court also found that there were substantial business justifications for Aetna's subsequent refusal to continue financing the project. *See, Juneau Square* v. *First Wis. National Bank of Milwaukee, supra* at 1326.

The Court's rulings on evidence and its instruction relating to Aetna were in keeping with the Court's prior decision. The Court allowed plaintiffs to introduce cer-

tain evidence pertaining to Aetna but refused to permit plaintiffs to relitigate Aetna's involvement in the alleged conspiracy.

The Court concludes that it did not err in instructing the jury regarding Aetna and in precluding proof and argument that Aetna was controlled or manipulated by the other defendants.

Plaintiffs challenge the Court's mortgage foreclosure law instructions, alleging that it was erroneous in its overall impact and failed to provide the jury with a fair and accurate standard for evaluating the conduct of the parties.

Plaintiffs specifically object to the particular aspects of the Court's instruction dealing with the operation of acceleration clauses and extensions of time to cure defaults. Plaintiffs also assert that the instruction ignored the equitable character of the precedure and the considerable latitude vested in the Court in foreclosure actions.

The Court instructed the jury in part as follows:

> The general purpose of a mortgage is to provide a security for payment of a debt or performance of an obligation. Thus, if a borrower is not able to pay the amounts due, the lender can look to the value of the property mortgaged to obtain payment. The law permits mortgages to be bought and sold and this right to transfer ownership of a mortgage is also important to its value. When a mortgage is in default, several things may occur. Holders of defaulted mortgages may grant the property owner additional time in which to discharge his obligations under the mortgage, but such extensions are entirely voluntary, are not required by law and may be made subject to any conditions the mortgage holder wishes to impose in order to protect its interest. If such an agreement is not made, the holder of the mortgage must invoke the

aid of the Court to enforce the provision of it, of this mortgage agreement. The mortgagee is authorized by law to foreclose on that mortgage and requires the property owner to either one, pay the full amount of the debt immediately if the mortgage so provides or two, relinquish to the holder of the mortgage all rights in the mortgaged property.

If the failure to pay real estate taxes constitutes a default under the terms of a mortgage, and the mortgagee is entitled to payment of the full amount of the mortgage upon default, payment of the real estate taxes would not bar the mortgagee from maintaining a foreclosure action. A foreclosure suit is a legal proceeding supervised by a court. Rules of equity or fairness are applied to such proceedings to insure fair treatment of both the creditor and the debtor. If the judge finds that the property owner has defaulted on the mortgage, he will enter judgment in favor of the mortgage holder. The law allows the party against whom the judgment was entered to redeem his property by paying the amount of the judgment within one year. If the property is not redeemed, the mortgage holder may then have the real estate sold at a sheriff's sale in order to recover the debt due it. (Tr. 10,587-88)

The statement that extensions of time to discharge an obligation under a mortgage are voluntary and "not required by law" is not erroneous. Such extensions are not required by law and may, as the Court stated, be made subject to any conditions the mortgage holder wishes to impose. The operation of acceleration clauses was also correctly presented to the jury.

Contrary to plaintiff's contentions, the Court did not ignore the equitable considerations in a foreclosure action. Rather, the Court stressed that "rules of equity or fairness are applied to such proceedings to insure fair treatment of both the creditor and debtor." (Tr. 10,588)

After carefully examining its instruction on mortgage foreclosure law, the Court concludes that the instructions, as a whole, accurately and unbiasedly set forth the applicable law. The instruction provided the jury with a fair and accurate standard for evaluating the conduct of the parties.

Plaintiffs argue that the Court erred by unduly emphasizing their burden of proof in giving the "equal hypothesis" instruction and by thereafter giving the "inference upon inference" instruction.

The following "equal hypothesis" instruction was stated to the jury:

> If from the evidence you cannot determine whether the allegations have been proved or not proved then your verdict should be for the defendants. (Tr. 10,560)

Plaintiff relies on *South East Coal Co.* v. *Consolidated Coal Co.*, 434 F.2d 767 (6th Cir. 1970) to support its position that this instruction was redundant, confusing and should have been omitted. The district court in the *South East Coal Co.* case did not give the equal hypothesis instruction and the defendant appealed on this and other grounds. The court of appeals stated that the trial judge should have directed a verdict if he believed that the evidence on both sides was equal in weight. The court then explained:

> It appears that the "equal hypothesis rule" is simply a negative way of phrasing the rule of law that a plaintiff must sustain his burden of proof. Thus, if a plaintiff does not come forth with evidence, when considered in light of opposing evidence, from which a jury could infer the truth of an alleged proposition over its contraproposition, the plaintiff has not met his burden of proof. *Id.* at 777.

The Court finds the "equal hypothesis" instruction was not erroneous.

With respect to the "inference upon inference" instruction, the Court told the jurors:

> A "reasonable inference" is defined as a process of reasoning whereby from the facts otherwise admitted or established by the evidence in the light of your common knowledge and experience, a reasonable and logical conclusion may be drawn that a certain fact is true. A reasonable inference is, therefore, to be thoroughly distinguished from a mere guess or conjecture. The law does not permit speculation. Moreover, on the basis solely of one inference so drawn a further inference may not be drawn.
>
> In other words, you may not pile inference on inference, but may draw an inference only from facts or circumstances which you find to have been established by a preponderance of the evidence. (Tr. 10,561-62)

Taken in context, this instruction was not erroneous. It explained to the jury the distinction between reasonable inferences and mere speculation and correctly stated that inferences must be drawn from a factual basis. Plaintiffs' motion for a new trial on this ground must be denied.

ALLEGED ERRORS IN RULINGS ON EVIDENCE

Plaintiffs challenge various evidentiary rulings of the Court and assert that these alleged errors necessitate the granting of a new trial.

Rule 103(a) of the Federal Rules of Evidence provides:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Plaintiffs state that the Court erred in prohibiting plaintiff Jack Moertl, Jack Cisco, and Richard Krauss from testifying to the reasons given by sources of financing for declining to finance Juneau Square East. Plaintiffs argue that Moertl should have been allowed to testify to the reasons given to him by Mr. Tishmann for the loss of the Cooper-Horwitz financing and to the reasons given by Cisco for loss of the New York Life Insurance Co. (New York Life) financing. According to plaintiffs, Krauss should have been permitted to testify to the reasons given him by Faulkner of New York Life for the loss of the New York Life financing and similar testimony by Cisco should also have been allowed.

One of the primary reasons for the Court's decision to grant a new trial in this case in 1977 was that hearsay evidence prejudicial to the defendants had erroneously been admitted into evidence over defendants' strenuous objections. In particular, the Court cited the fact that Moertl was permitted to testify in the first trial about a conversation he had with Cisco about the loss of New York Life financing.

In this testimony, Moertl characterized a conversation he had with Cisco who was repeating a conversation he had with some unidentified person. This testimony clearly involved multiple levels of hearsay and was properly excluded by the Court in the second trial.

The testimony of Krauss and Cisco similarly involved conversations with persons who were repeating statements made to them by other sources. This is clearly hearsay and inadmissible. The fact, as plaintiffs assert, that each of the proposed witnesses were either spokesmen for the financial institutions involved or received the information from such spokesmen does not change the fact that they were repeating information received from another who received it from still another source.

This testimony sought to be introduced was clearly hearsay and would have been highly prejudicial to the defendants. The Court properly excluded this proposed testimony.

Contrary to plaintiffs' contentions, the Court did not require witnesses to change facts or testimony to accommodate any unrealistic sequence of events caused by the Court's excluding the above-described testimony. No error was committed in this regard.

Plaintiffs argue that Warren Stringer should have been allowed to give his opinion about the validity of Metropolitan Life Insurance Company's (Metropolitan) expressed reasons for refusing to finance Juneau Square East. Plaintiffs offered to prove through Stringer that, after several months of work on a financing package for Juneau Square, he received a letter setting forth "stereo-typed boiler plate" reasons for the turndown of the loan. Stringer stated that there was some other reason for the turndown, but he did not know what it was. However, he said the reason given "was not the genuine reason." (Tr. 2838-39)

Rules 701 and 702 of the Federal Rules of Evidence set forth criteria for the lay opinion and expert opinion testimony. In order to offer opinion testimony by lay witnesses, rule 701 provides that the witness' opinion must be (1)

based on personal knowledge; and (2) must be helpful to the trier of fact. *See* Weinstein, Evidence ¶ 701[02] p. 701-10 (1978).

Stringer's proposed testimony did not meet this criteria and, therefore, was properly excluded by the Court.

Plaintiffs challenge various evidentiary rulings relating to Marshall-Michigan, including the exclusion of various portions of the depositions of Donald E. Boerema, Charles Pinto, and William Clark.

The Court has examined the trial transcript and its prior rulings, excluding certain sections of these depositions from the trial. Many of the sections excluded contained hearsay, speculation or lacked adequate foundation. The Court finds that these portions of the deposition testimony of Boerema, Pinto and Clark were properly excluded from the trial.

Plaintiffs challenge the Court's ruling on the Marshall-Michigan letter to Juneau Square tenants. As previously determined, whether an action violates principles of tort law is not, in and of itself, proof of a violation of antitrust law. The Court finds that it did not err in failing to instruct the jury that the letter sent by James Huber on behalf of Marshall-Michigan to Juneau Square was tortious.

Furthermore, the Court was not inconsistent in deciding that Judge Robert Landry's decision should be excluded and in refusing to strike Huber's testimony regarding his rationale for sending the letter to the tenants. (Tr. 7856-61) Judge Landry's dicta regarding the procedure utilized by Marshall-Michigan was not relevant to this action and was prejudicial to the defendants. On the other hand, the Court reaffirms its position that Huber's thoughts and intentions at the time he drafted the tenant's letter is relevant with respect to his motivation. (*See* Tr. 7861)

The Court concludes that it did not err in its rulings regarding the Marshall-Michigan letter to tenants.

Plaintiffs assert that the Court's restrictions on plaintiffs' cross examination of John Sann was extremely prejudicial. Certain questions about documents were excluded by the Court because the witness had never seen the documents, and because questions about the documents were not raised during direct examination. (*See* Rule 611(b) of the Federal Rules of Evidence.)

After due consideration, the Court concludes that it did not err in setting certain limitations on the cross examination of Mr. Sann.

The Court also concludes that it was not in error to prevent plaintiff Moertl from testifying that the reason given to him by Aetna's attorney, James Urdan, for Aetna's entry of foreclosure judgment on January 4, 1972 was that Marshall-Michigan had entered its judgment the preceding day. Urdan could have been called as a witness by plaintiffs. In addition, the question of Aetna's decision to enter foreclosure judgment was not raised by plaintiffs when Urdan testified on behalf of the defendants. Finally, Aetna's rationale for entering its foreclosure judgment was not relevant to the issues in the second trial.

Plaintiffs contend that they should have been allowed to introduce evidence on the circumstances for the formation of Wil-Ten Associates. The Court considered plaintiffs' arguments at trial and declined to admit the evidence, stating that the evidence did not have sufficient probative value "that would justify the influence for which plaintiff would obviously be offering it." (Tr. 608)

The Court has reexamined its decision and finds that it did not err in excluding these prejudicial statements about the rational for the formation of Wil-Ten Associates.

The Court excluded plaintiffs' exhibits 491 and 533, which listed First Wisconsin's real estate holdings and Northwestern Mutual Life Insurance Company's (NML) real estate holdings in Milwaukee's central business district, respectively.

Plaintiffs argue that the size and power of these companies in the relevant market had an obvious bearing on the existence of a conspiracy and on the issue of the reasonableness of the restraint of trade. The Court is not persuaded by plaintiffs' position. The fact that First Wisconsin and NML are large corporations with extensive real estate holdings in the central business district does not, of itself, support plaintiffs' allegations of conspiracy.

After careful consideration of the evidence and arguments of the parties, the Court finds that these exhibits were properly excluded. Even though the exhibits were inadmissible, plaintiffs were not foreclosed from all inquiry about these property listings and the relationship between NML and First Wisconsin. Plaintiffs had an opportunity to examine Richard Holscher on the First Wisconsin's real estate holdings (Tr. 5378-71) and Donald Mundt on the NML listings (Tr. 3893-96). Other exhibits pertaining to NML were introduced into evidence. *See* PX 523-532 and 537-544.

The Court, therefore, concludes that it did not err in excluding the exhibits listing the real estate holdings of First Wisconsin and NML.

Plaintiffs challenge various Court rulings relating to the New York Life financing. Specifically, plaintiffs state the Court erred in (1) excluding certain testimony of Moertl, Krauss and Cisco; (2) in its ruling on deposition and prior trial testimony of New York Life witnesses; (3) in excluding certain questioning of Edward Rose;

(4) in excluding from evidence portions of plaintiffs' exhibit 408 and the handwritten notations on plaintiffs' exhibits 383 and 419; and (5) its evidentiary rulings relating to First Wisconsin's credit report to New York Life.

The Court has previously concluded that it did not err in excluding the testimony of Moertl, Krauss and Cisco regarding the alleged reasons for New York Life's turndown of the Juneau Square loan.

With respect to the deposition and prior testimony of the New York Life witnesses, the Court finds it did not commit prejudicial error warranting a new trial in refusing to permit certain testimony. To advise the jury that much of the questioning of the New York Life witnesses during their depositions was conducted by David Beckwith of Foley & Lardner would have been unduly prejudicial, in addition to being irrelevant to the issues in this action. The Court had a similar problem with plaintiffs' exhibit 422, the Martindale-Hubbell listing showing that Foley & Lardner represented New York Life as of 1971.

The Court concludes its rulings on these questions were not erroneous so as to require the granting of a new trial.

Plaintiffs sought to impeach Rose's testimony to the effect that First Wisconsin's unfavorable credit report to New York Life was not a factor in the May 19, 1971 decision of New York Life to refuse financing and had not been discussed at this committee meeting. Handwritten notations on plaintiffs' exhibit 419, the committee brief of the meeting, indicate that the credit report had been discussed.

In his testimony, Rose stated he did not know who made the handwritten notations or when they were made (Tr. 8634-8639). In addition, the handwriting had not previ-

ously been identified. The Court therefore concluded that Rose could not be questioned on the contents of these notations.

Upon reconsideration, the Court finds that this ruling was not erroneous and plaintiffs are not entitled to a new trial on this ground.

The Court properly excluded the handwritten notations on plaintiffs' exhibits 383 and 419. The requirements of the business records exception to the hearsay rule, Rule 803(6) of the Federal Rules of Evidence, were not met in this instance. No testimony was presented about the identity of the writer of the notes nor did anyone testify that these notations were made in the course of New York Life's regularly conducted business and were a regular practice of the company.

With respect to plaintiffs' exhibit 408, the Lutz-Duncan memorandum, this memorandum was to be utilized to support plaintiffs' theory that the First Wisconsin defendants were attempting to interfere with the New York Life loan application.

In the first trial in this action, the Court granted a new trial in part because of the hearsay evidence of a highly prejudicial nature contained in this memorandum. The Court stated that several levels of hearsay were found in the memorandum and concluded that the "lack of trustworthiness and the prejudicial nature of this memorandum and self-evident." *Juneau Square Corp.* v. *First Wis. Nat'l. Bank, supra* at 1324.

After careful consideration of plaintiffs' arguments, the Court declines to change its earlier ruling. The Court finds that the memorandum contains prejudicial hearsay and was properly excluded by the Court.

According to plaintiffs, the basic accusation made in First Wisconsin's credit report to New York Life was that First Wisconsin was involved in the construction lending on Juneau Square and found that proceeds were not being used as indicated. Three witnesses were offered by defendants to justify this statement: Austin Lett, John Dickens and Alfred Little, author of the report. Only Little testified in person at the trial.

Dickens' prior trial testimony was read to the jury because he was unavailable as a witness pursuant to Rule 804(a)(4) of the Federal Rules of Evidence (Tr. 6412-16). Plaintiffs do not challenge the propriety of the Court's decision on this ground.

However, plaintiffs state that the Court should have required that the entire deposition testimony of Lett be read to the jury.

Rule 611(a) of the Federal Rules of Evidence provides:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

The Court exercised its discretion and allowed the parties to decide their trial tactics and the best way to present their evidence. The Court did not err in refusing to order that the entire Lett deposition be read into evidence in sequence.

Plaintiffs assert that they were allowed inadequate time to cross-examine Little and that the Court improperly quashed their subpoena of Little. Little, who had been waiting to be called to testify for two days, was finally called to the stand on Friday, May 26, 1978 at 4:26 P.M.

The Court split the remaining time between plaintiffs and defendants.

During their cross-examination, plaintiffs were able to ascertain the source of Little's belief that Juneau Square had used funds for purposes other than had been indicated to the bank. Plaintiffs also were able to elicit the admission that if this underlying report was incorrect, then his statement to New York Life was also incorrect.

Plaintiffs then subpoenaed Little at the close of his testimony and defendants moved to quash the subpoena.

In ruling on this motion, the Court noted that the time constraints were, in part, necessitated by the extensive cross-examination of a prior witness, and that the Court had indicated to plaintiffs that they should consider curtailing this cross-examination. Nevertheless, the cross-examination of Sann continued until 4:25 P.M. (Tr. 8179).

Prior to deciding the motion to quash, the Court questioned Little, a Florida resident, who indicated it would be "very inconvenient" for him to return the following week. The witness also professed an inability to add anything further to the statements he had already made. (Tr. 8174-8177). In light of all these factors and the Court's uncertainty as to the validity of the service of the subpoena, the Court granted the motion to quash the subpoena (Tr. 8179-80).

After careful consideration, the Court now finds that plaintiffs were not unduly prejudiced by the time limitations and that the Court did not err in quashing plaintiffs' subpoena.

ALLEGED ERRORS IN TRIAL MANAGEMENT

Plaintiffs contend that certain other decisions of the Court were highly prejudicial to the plaintiffs and necessitate the granting of a new trial in the interests of justice. Specifically, plaintiffs list the Court's time restrictions on the trial and closing arguments, the limitations placed on the cross-examination of certain witnesses and the alleged misconduct of defense counsel and defense witness Harold Shapiro.

A. *Time Restrictions*

The second trial in this case commenced on Monday, March 20, 1978, at 2:00 P.M. Court recessed for the day at 6:45 P.M., after a jury of six plus four alternates had been selected. The Court blocked out some twelve weeks of its trial calendar for this trial. Plaintiffs had thirty-four days of actual trial time and the defendants had twenty days of trial time. Plaintiffs were allotted five hours for closing argument, including rebuttal, while the defendants had four hours for their closing argument. The plaintiffs request for a minimum total of six hours for argument was denied by the Court. (Tr. 10,149)

Plaintiffs assert that these time constraints denied them the opportunity to present their claims completely and fairly. Plaintiffs point out that defendants were permitted extensive cross-examination of witnesses called by plaintiffs but identified with the defendants and that they were required to read irrelevant portions of depositions counterdesignated by the defendants. In addition, defendants were allegedly permitted extensive voir dire. In the opinion of plaintiffs, all of this combined to further shorten their already too limited trial time.

The Court was very aware of the complexity of the case and the great quantity of evidence to be presented. These factors were taken into consideration in blocking out some

three months for the trial. Two days were set aside for closing arguments.

The Court also recognized its responsibility to parties to other litigation pending before the Court. Considering the crowded dockets of the courts, the Court has a responsibility to exercise reasonable control over the amount of trial time allotted to litigants. Affording parties unlimited amounts of trial time prejudices other litigants before the Court who must then wait extra months before their cases come to trial. These factors must also be considered and were considered by the Court.

During the entire three months of trial, the Court handled its regular schedule of status reports, pretrial and final pretrial conferences, arraignments, and sentencings. Hearings on temporary restraining orders and preliminary injunctions were also scheduled as the need arose. To allow plaintiffs additional time for closing arguments would have cut into the Court's time allotted to other pending cases or necessitated the extension of closing argument to a third day. Under the Court's time schedule, each side's argument could be presented in one trial day. The Court did not err in restricting time for closing arguments and in setting very reasonable time limitations for the trial.

Furthermore, the Court finds that it did not err in requiring plaintiffs to read deposition designations and the counterdesignations by the defendants or in permitting defendants to conduct voir dires on revisions of plaintiffs' damage exhibit. Such decisions are discretionary with the Court and, in these instances, were designed to further the orderly presentation of the evidence. These decisions were not prejudicial to plaintiffs so as to necessitate a new trial.

In summary, the Court is not persuaded by plaintiffs' arguments that the time constraints prevented plaintiffs from fairly and fully presenting their case. The Court set

aside a substantial amount of time for this trial with minimum interruptions. The amount of time was not unreasonably short, and the five hours allotted to plaintiffs for closing arguments did not unfairly prejudice the plaintiffs.

Therefore, the Court finds that the time constraints placed on the parties were reasonable in light of all the facts and circumstances and did not deny plaintiffs a fair trial in this case.

B. *Plaintiffs' Cross-Examination of Witnesses*

Plaintiffs also assert that they were unduly prejudiced when the Court limited the cross-examination of James Huber and George F. Kasten. Plaintiffs sought to question Huber about a matter outside the scope of his direct examination and the Court properly excluded this line of questioning. Rule 611 of the Federal Rules of Evidence. (*See* Tr. 7663-7672)

Plaintiffs wanted to confront Kasten with the deposition testimony of Holscher which allegedly contradicted Kasten's testimony. The Court did permit plaintiff to introduce the Holscher deposition excerpt later in the day at the end of Kasten's testimony. Under the circumstances, the Court finds that plaintiffs were not unduly prejudiced so as to be entitled to a new trial on this issue.

C. Alleged Misconduct of Witness and Defense Counsel

Plaintiffs assert that the alleged misconduct of defense counsel, Peter Baugher, and of Harold Shapiro, a witness identified with the defendants, took place when candy was obtained from a juror while the Court, court staff, plaintiffs' counsel and other defense counsel were engaged in conferences at the side bar.

According to plaintiff John Spoden, he personally observed Baugher obtaining candy or other snack food from a juror on two separate occasions during the trial. The first incident occurred when plaintiff Moertl was testifying and the second while Shapiro was testifying on April 12, 1978. Spoden also observed on April 12, 1978, that Shapiro made comments to the jury and obtained candy from a juror. (Spoden Affid. ¶ 2.)

When the Court was informed of these activities, the Court indicated it would instruct the jury about the candy problem. The Court also admonished Shapiro not to take any additional candy from any juror. (Tr. 2478)

Plaintiffs' counsel at the time asked that Shapiro be "admonished or requested from here on in not to do any other activity of that type" and that the bailiff monitor the jury box area during sidebar conferences. (Tr. 2476) Plaintiffs did not move for a mistrial at the time.

Plaintiffs state in their reply brief that plaintiffs' counsel did not become aware until after the trial that one of the defense counsel had repeatedly obtained candy from a juror. Had they known about this, plaintiffs assert, they would have asked for a mistrial or public admonishment of defense counsel.

In his affidavit, however, plaintiff Spoden states he observed defense counsel taking candy from a juror on two occasions, the last on April 12, 1978. Thus, plaintiffs had notice of defense counsel's activities at the time the Court instructed the jury about this type of conduct.

The Court did not condone these occurrences but, instead, took steps to correct the problem. Moreover, the Court finds that these occurrences were not unduly prejudicial to plaintiffs and do not alone warrant the granting of a new trial.

D. Other Alleged Prejudicial Errors

Plaintiffs also cite in their brief several other errors allegedly committed by the Court during the presentation of evidence. With respect to the testimony of James Liek, the Court finds that his testimony was admissible and of probative value.

The Court also did not erroneously rule and comment upon plaintiffs' counsel's presentation or upon the reference to Arthur Anderson in the plaintiffs' damage presentation. Nor did the Court attempt to enhance the credibility of certain defense witnesses by asking friendly and rehabilitating questions. Rather, the Court's questions were designed to obtain clarification of issues or to elicit further explanation of a particular point.

Plaintiffs further assert that the exclusion of plaintiffs Spoden and Moertl and their wives from the courtroom during the cross-examination of defense witness Huber was unduly prejudicial and erroneously suggested to the jury that these plaintiffs had engaged in some misconduct.

The Court is not persuaded by this argument. Plaintiffs Moertl and Spoden were only excluded for the few hours of the cross-examination of Huber because they were to be called as rebuttal witnesses and might be testifying as to the same transaction as Huber. Moreover, these plaintiffs were only excluded after the Court granted plaintiffs' motion to exclude Sann from the courtroom during the balance of Huber's testimony. (Tr. 7647-7651) Therefore, plaintiffs' motion for a new trial on this ground is denied.

Contrary to plaintiffs' contentions, the Court did not take an unduly restrictive view of the business records exception to the hearsay rule and other rules of evidence to the detriment of plaintiffs. Rather, the Court properly applied the rules of evidence fairly and impartially during the course of the trial.

In their post trial motion, plaintiffs also allege other errors warranting a new trial, although these grounds were not specifically addressed in their brief. Plaintiffs allege that defendants' attorneys, in their opening statement and closing argument, made numerous erroneous assertions of law and fact not supported by the record, thereby substantially prejudicing plaintiffs. The Court has examined the record and finds that the defendants' opening statement and closing argument to the jury were not prejudicial to the rights of plaintiffs.

With respect to the other grounds for a new trial, the Court has considered plaintiffs' arguments and finds that no error prejudicing the rights of the plaintiffs was committed.

In conclusion, the Court finds, after careful examination, that the alleged errors in the trial of this action with respect to jury instructions, evidentiary rulings, and other trial management decisions, were basically fair to both sides and were not unduly prejudicial to plaintiffs so as to require the granting of a new trial in the interests of justice. Moreover, the Court is convinced that the cumulative effect of the trial time restrictions and the alleged errors of the Court are not of sufficient substance and magnitude to warrant ordering a new trial.

Ultimately, the Court has the duty to see that there is no miscarriage of justice. Only if the Court is convinced that there has been, should it set aside the jury's verdict.

In this case, the Court has exhaustively examined the testimony and evidence presented and has carefully considered the arguments of plaintiffs in support of their motion for a new trial. In the final analysis, the Court finds that no miscarriage of justice occurred and that the interests of justice are served by upholding the jury's verdict in this action. Accordingly, the Court hereby orders that plaintiffs' motion for a new trial must be and is hereby denied.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
July 3, 1980.
Before
Hon. Robert A. Sprecher, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Nicholas J. Bua, District Judge*

JUNEAU SQUARE CORP., et al.,
Plaintiffs-Appellants,

No. 79-2037 vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Wisconsin
No. 72-C-533
Robert W. Warren, Judge

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this court filed this date.

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* The Honorable Nicholas J. Bua, United States District Judge for the Northern District of Illinois is sitting by designation.

Simpson Dep Ex 1
9/11/78 RPE

H. S. —

I'm unable to make Chicago run, I regret to say, & so I took your notes for you. I hope they are readable. I'll call Frei. to discuss. In case I miss you Frei. (or you haven't received this by then) I'll try to reach you by tele. from Aspen next week. I'm staying at Chateau Dumont, Apt. 14.

I'll take a rain check on the georgeous lunch = I know you would have bought me.

Hope we can work this out - should be fun.

mm.

Skipwith Exhibit 2
3/12/76 RJC

CONFIDENTIAL

MEMO TO H. S.

EXHIBIT 304

1. The property involved is known as Juneau Square located on a block across from NML bounded on the N. by E. Wis. Ave, N. Marshall St. to the East, E. Michigan St. to the South & N. Cass St. to the West.

There are two existing bldgs:

Owned by Juneau Square Corp. subject to sale-leasebacks described below

Juneau Square South - 4 story brick office bldg; 54,000 sq. ft. lentable area.

Juneau Square North - 9 story brick office bldg.; 88,000 sq. ft. of lentable area (containing Commonwealth Mutual Savings Bank & Eugene's Restaurant)

Includes underground parking for 390 cars and a Mobil gasoline station to the south.

2 gas

Design Dept. file 3/11/71 RJC (2)

2. Balance of block was "being acquired" as of July '68, and precise status of title now not known. (This can be checked later.) We desire entire block. J. Sgrave now proposes to build new project (brief announcement in Mil. newspapers):

I believe they had options on balance of block - see note below

Juneau Square "East" — 22 stories, 243,000 sq. ft. 1st 8 floors for Howard Johnson restaurant & motor inn (144 rms.) — next 11 floors for offices, 1st 3 (possibly) as deluxe apts.

3. Major tenants in existing bldgs include

Aetna — 24,000 sq ft. (1st & 2nd floors, J.S. South) (Approx 4.40 sq ft.) 3 7m 7m

(3)

TRAVELERS – 28,000 sq. Ft.
(Approx $4.40)
FIREMANS FUND – 12,000
Average rental ED excluding those runs = $5.49 South,
$5.72 North.

Aetna has options for total of 6,400 sq. ft. Addl (and we are advised they want some or all of this), and Travelers for 6,400. J.S proposes to meet these by moving other tenants into new project.

(We might have to satisfy Aetna that our plans will accomodate their space needs, although we're not anxious to commit on this.)

GROSS rentals from existing facilities estimated $800,000.

4 pm

(4)

3. Juneau Square Corp.
is a Wis. Corp., wholly-owned
sub of WIL-TEN-CO, a wis.
corp. Officers, directors
& shareholders are

Ralph Conway - retired
financial exec. of
Globe Union

John Spooden - Architect

Jack Mockrl - Atty.

~~Land Ac~~
Land for "South" & "North" &
Service Station
Acquired for cost of $1,307,000
from Milwaukee Redevelopment
Authority, City of Milwaukee,
NML & others. Improvements,
including gas station, cost
$5,547,900 - total inv.
of about $6,850,000.

They apparently had agreements or options to buy remaining parts of block - 18,320 sq ft. of land - for $840,000.

A "sale & leaseback with
option to repurchase" was
arranged by J. S. with
Marshall-Michigan Co., a

5
MTM

Stephens Dep. Ex 6
3/11/76 KJC

(5)

CURACAO Corp. in Aug. 1966.
ONE-half OF title to
South, North & Service
Station sold to that Corp.
For $1,000,000, with
lease back For 20 yrs.
Net rental 7,000 per mos
plus ONE-half of
Aetna mtge payments
(see below). J.S. has
option to buy back during
last 5 yrs of term.
A mtge (subordinate to Aetna)
has been granted on ~~entire~~
entire South, North & Service
Station to secure lease.

ONE-fourth OF title to
South, North & Service Station
sold to "close friends and Associates"
for $250,000 in 1965 & 1966.
These were sold a
leaseback Arrangement - 49 yr.
lease (renewal option For 50 & 49 yrs.)

Telephone Log #7 (6)
3/10/76 RJE.

for gteed rent of 1,041.67 mo. or 25% of net rentals, whichever is greater. (Not sure about Repurchase Arrangement.) Juneau Square, therefore, actually owns only 1/4th of title.

4. Aetna mgage for $4,500,000, 25 yrs., 5 3/4% recorded MAY, 1966 on North, South & Service Station. Balance, we understand, is approx 4,380,000 (Not clear why - apparently not fully disbursed, because we understand no principal paid back). Aetna agreed on moratorium on plain. from 11/1/68 - 12/31/69 and 6% rate now in effect - will revert to 5 3/4% when monthly prin. + int. payments start next yr.

Mrk

Shapiro Dep Ex 7
3/11/76 RJC (7)

No other liens we know of. Except for Marshall-Michigan 2nd mtge.
(but no recent title info now available).

5. We have reason to believe Aetna might like out of this situation -
a. low rate
b. ~~to~~ shaky financial history of project & its developers

We understand developers have been trying to raise funds for new project from various sources, and they are apparently down to Aetna & will be filing application next week for loan for "East" project (estimated cost, including land, $11,500,000 & $4,000,000)

8
MJM

Shapiro file 19
3/11/71 ltr

(8)

To show adequate "equity" to support loan, they are apparently trying to "allocate" part of existing project to new one - e.g. service station, parking facilities, etc.

6. Our strategy:

a. Be representative of interested undisclosed party, contact Aetna for preliminary discussions. We believe best contact wd. be _____ Swinehart, who once held title of V.P. in charge of Mgages. Might start with him, see where he leads you. (Not sure of Swinehart's present status.) Home office Hartford, Conn.

b. Our client's int. is to purchase entire block

9 mtn

Skapine Exp x 10
3/11/76 RJe (9)

for CASH. ~~So~~ Our knowledge of details of deal, AS disclosed to Actwa, shd. be limited to what we might have been able to find out w/o "inside" INFO (will leave to your good judgment) We would pay fair CASH price equal to market value. General outline, IF

c. Actwa interested -

(1.) Actwa ~~negotiates~~ negotiates sale price with owners, reports back to you

(2.) IF Acceptable price, we would give Actwa Agreement to purchase ~~from~~ from them (or AS their nominee) for CASH. We would provide financial ASSURANCE to Actwa

Shapiro Dep. #11
3/10/76 R.J.C. (10)

satisfactory to Aetna
(e.g. ltr. of credit
from Chicago bank);
~~assets~~ purchasers
would be shell corps.
IF required, we would
disclose our prin., on
confidential basis, to one
high Executive of Aetna,
who could assure their
committees of integrity
& reliability of purchasers.

(3.) Immediate timing — contact
Aetna March 10 or so,
make appointment following
week. Long range timing -
consummate as soon as
can be worked out.

(4). Kill, Shapiro.

11
MM

NYL NEW YORK LIFE OFFICE MEMORANDUM

DATE June 17, 1971

TO MANAGER FAULKNER

SUBJECT Conference Call
Milwaukee Office Project

FROM F. B. Walker

Participants: Harold Barian
Bill Lutz
Bruce Davies
Bob Conklin
Frank Walker

General synopsis: Barian wanted to know what specific objections existed to our making this deal.

Mr. Lutz indicated:

1. Sponsors had mis-handled funds and were being foreclosed.
2. Bank was not sufficiently capitalized to handle gap funds.

Barian has substitute money sources (private) and would remove the present developers. He is interested in getting O.T. or other developers into the deal. He did not offer names of new principals and/or developers at this time. He questioned Lutz that if all were brought to the fore could the deal be saved. Lutz replied it would have a good chance.

Barian indicated he would need a week to put it all together before getting back to us.

The conversation was ended.

Frank

Senior Appraiser

FBW:FP Note: Then spoke to Conklin separately he indicated he is not getting involved. Spoke to Barian he stated he had told Spoden & Hoeft that they either got out or he "Bank" would and thereby build the deal. He will let us know the results. I attach

PX383

6858 10-66 (8½x11) Printed in U.S.A.

445

Excerpt from Testimony of William C. Lutz (NYL)

Mr. Campion Kersten: The number on this memorandum is 383.

Mr. George Kersten: I'm sorry, your Honor, I misread my own writing.

Mr. McSweeney: Would you hold it a minute while we get that? All right.

Mr. George Kersten: Okay?

Mr. McSweeney: All right.

Mr. George Kersten:

"Q. Did you in that call express the reasons for that declination?

A. He says I did.

Q. Go ahead, as you recall it, as refreshed by this memorandum, and then in the next page toward the bottom, please go ahead.

A. I will have to say that the memorandum says that Mr. Lutz indicated 1, sponsors mishandled funds and were being foreclosed. 2, bank was not sufficiently capitalized to handle gap funds.

Now, I have to also tell you—

Q. Now go ahead, let us get your testimony on the record.

A. I have to also say that I could have given him other reasons besides this, but this is what he has noted.

Q. You recall giving him at least these reasons?

A. Where it says number one, 'sponsors have mishandled funds and were being foreclosed.' Dates there

refer to the same data as shown in Paragraph 2 of this May 11, 1971, bank check, where it says, 'our source bank had a part in the construction lending and further proceeds were not being used as indicated.'

Q. This is the report given by Mr. Albert C. Little?

A. Yes, that would be in effect coming to that conclusion.

Q. Well, that was the source of that opinion on your part, wasn't it?

A. Yes.

Q. Now, the sponsors as referred to in your answer just a moment ago, that would be Mr. Moertl and Mr. Spoden and the Juneau Square Corporation people?

A. Yes.

Q. And the bank, the No. 2, the Midland Bank, correct? One other question, with regard to any other reasons, there are no other reasons listed on this memorandum, are there?

A. No.

Q. Now then, during the months of May and June, and I want to begin with May 19. In other words, from May 19 through the balance of May and on through the month of June, will you state whether or not there were any other communications between the First Wisconsin National Bank and New York Life Insurance Company?

A. I have no idea.

Q. Did anyone ever tell you about any such

May 11, 1971

CREDIT CHECKING

B. J. Davey

Midland National Bank

Milwaukee, Wisconsin

We were told that the Juneau Square Corporation is a wholly owned subsidiary of Wiltenco, a company engaged in the construction of office buildings. The subsidiary was incorporated to handle the development of property at Marshall Street and Wisconsin Avenue. Principals in both organizations are Mr. Ralph Conway, Mr. Jack Moertl and Mr. John Spoden.

We were told that the property has been developed in instalments and was "bootstrapped all the way." They have a high debt. It was believed that the mortgage held by the Aetna was in trouble and the lender has agreed to defer foreclosure. Our source bank had a part in the construction lending and found proceeds were not being used as indicated. There appeared to be several recent judgments and liens against the property.

It was our source's opinion that the entire project was not adequately financed. Recent high interest rates gave them real problems.

The Midland National Bank was described as a retail oriented institution that has made reasonable progress. They took over the bank a short while ago and this accounts for a jump in deposits from $60 million to $100 million. The bank's President, Mr. Kelly, was described as a very aggressive banker who was not well liked in the local financial community. He had been with the Marina Bank where, he led a proxy fight to get control of the corporation that was largely owned by interests close to the bank for which he was working.

It was believed that some of the funds in this venture comes from the Norris Grain Company interests in Chicago.

BJD:MB

(Information obtained from Mr. Albert C. Little, V.P., First Wisconsin National Bank, Milwaukee, Wisc.)

Document 2 of 3
2/1/73 Def 452

OFFICE MEMORANDUM

DATE May 11, 1971

TO CREDIT CHECKING

SUBJECT Midland National Bank
Milwaukee, Wisconsin

FROM B. J. Davey

We were told that the Juneau Square Corporation is a wholly owned subsidiary of Wiltenco, a company engaged in the construction of office buildings. The subsidiary was incorporated to handle the development of property at Marshall Street and Wisconsin Avenue. Principals in both organizations are Mr. Ralph Conway, Mr. Jack Moertl and Mr. John Spoden.

We were told that the property has been developed in instalments and was "bootstrapped all the way." They have a high debt. It was believed that the mortgage held by the Aetna was in trouble and the lender has agreed to defer foreclosure. Our source bank had a part in the construction lending and found proceeds were not being used as indicated. There appeared to be several recent judgments and liens against the property.

It was our source's opinion that the entire project was not adequately financed. Recent high interest rates gave them real problems.

The Midland National Bank was described as a retail oriented institution that has made reasonable progress. They took over a bank a short whil ago and this accounts for a jump in deposits from $60 million to $100 million The bank's President, Mr. Kelly, was described as a very aggressive banker who was not well liked in the local financial community. He had been with the Marine Bank where, he led a proxy fight to get control of the corporation that was largely owned by interests close to the bank for which he was working.

It was believed that some of the funds in this venture comes from the Norris Grain Company interests in Chicago.

RECEIVED MAY 13 1971 WILLIAM C. LUTZ

Record PX413

64

6845 10-64 (8½x11) Printed in U.S.A.

PLAINTIFFS' COPY

OFFICE MEMORANDUM

Dictated on tape May 21, 1971
Date May 24, 1971

To TREASURER DUNCAN

From William C. Lutz

Subject Proposed loan - joint venture to formed with following participants: Junaau Square Corporation and Midland National Bank - SWC Wisconsin Avenue and Marshall Street, Milwaukee, Wisconsin

I learned from Regional Officer Wilford that he had a discussion with Baird & Warner regarding our declination of the subject case. He was told by our correspondent that they had been called by the First Wisconsin Bank, apparently to determine whether the applicants, or anyone associated with them, had any "clout" with New York Life.

They apparently made it clear to Baird & Warner that they didn't want this building built - apparently because it would interfere with the timing of the leasing in their proposed building. Our correspondent conveyed to Joe Wilford the feeling that there were veiled intimidations along the lines that First Wisconsin would use their best efforts to delay or interfere with the construction of this building.

I do not know whether First Wisconsin Bank was one of your sources of information but if it was, I must tell you that I consider that bank, because of its own plans for building across the street, as hardly falling in the category of a disinterested source of information - rather, I would consider them as having a definite conflict of interest in reporting on their competitor's efforts in building a structure across the street from their proposed building that will come on the leasing market at least a year or more ahead of their building.

I bring this information to your attention because it appears that additional substantial ownership participation may be injected in this case which, of course, will result in it being presented to the committee again.

Wm C. Lutz

Vice President

WCL:S

PX 408
Board

AS 5

PLAINTIFFS' EXHIBIT 498
Received 7/14/76

DOWNTOWN OFFICE SPACE

(Lake to 7th - Wells to Michigan)

	SEPTEMBER, 1964	MAY, 1966	MAY, 1968	OCTOBER, 1970
Total	3.23 mm sq.ft.	3683 3753 mm sq.ft.	3845 3695 mm sq.ft.	4,348 4676 mm sq.ft.
Vacancy	526,000 sq.ft. 15.8%	473,000 sq.ft. 13.4%	518,000 sq.ft. 14.1%	440,000 sq.ft. 9.41%
Vacancy East of River		13.6%	10.5%	5.4 %
New Space Added		277,000 sq.ft. 0	210,000 sq.ft. 0	625,000 sq.ft. 125,000
Space Absorbed (New space less internal growth plus vacancy reduction)		230,000 sq.ft.	120,000 sq.ft.	575,000 sq.ft. (Average 210,000/yr.)
Total Class A & B		2,924,000 sq.ft.	3,064,000 sq.ft.	*2,064,000 sq.ft.
Number of Buildings		56	59	62
Number Additional Buildings Reported		4	3	10
Class A Vacancy		1,044,000 sq.ft. 9.14%	1,249,000 sq.ft. 12.4%	1,483,000 sq.ft. 8.3 %
Class B Vacancy		1,880,000 sq.ft. 12.3%	1,815,000 sq.ft. 11.1%	583,000 sq.ft. 2.2 %
Class C Vacancy		605,000 sq.ft. 24.0%	630,000 sq.ft. 25.5%	2,610,000 sq.ft. 11.6%
		= 146,000 sq.ft. 58% of total vacancy	= 161,000 sq.ft. 31% of total vacancy	= 304,000 sq.ft. 69% of total vacancy

* Changed rating method - A before 1970 was 100% AC or new B = partial AC of modernization. 1970 A = only new buildings; B = fully remodeled and AC. Also added owner occupied to competitive space.

1264

App. 186

MILWAUKEE DOWNTOWN SPACE ANALYSIS

May, 1966 to October, 1970:

Space absorbed of 868,000 sq.ft. or 192,000 sq.ft./yr.

Present Vacancy:

440,000 sq.ft., of which 123,000 sq.ft. is new.

(Total downtown space, including 5 banks, is 4,676,000 sq.ft.)

Proposed Space:

MGIC	160,000 sq.ft.
Marine MGIC	20,000 sq.ft.
Old First Wisconsin	200,000 sq.ft.
New First Wisconsin	430,000 sq.ft.
Total	810,000 sq.ft. (assumes 3 floors over base)

or 4.2 yrs. to fill at the previous absorption rate

Possible New Buildings:

Lewis Center (3 floors)
First Federal Building
Manpower Building
Schlitz Building
Juneau Square Building

It should be noted that the space absorbed over the last 4.5 yrs. includes the following major tenants:

M & I	100,000 sq.ft.
First Wisconsin	60,000 sq.ft.
Marine	20,000 sq.ft.
Telephone Company	20,000 sq.ft.
Total	200,000 sq.ft.

This would lead one to the conclusion that it would take even more than the 4.2 yrs. to fill up the proposed new space and also assumes no other new buildings would be built in this period.

3239

RHE 11/12/70

SPACE BUILT - 1962 TO 1970

(Approximate BOMA Figures 10/1/70)

BUILDINGS	SQ.FT.	OCCUPANCY GREATER THAN
IBM Building	110,000	96%
Jackson-Mason Building	9,000	96%
Lewis Center	90,000	96%
Juneau Square	144,000	96%
Marine Plaza	401,000	96%
M & I Bank	269,500	96%
National Trunk (across from Marine)	20,000	77% (½ ground floor vacant)
660 East Mason	22,000	96%
Office on the Square (Wells-Jefferson)	30,000	90% (tenant wants to leave 23%)
Catholic Knights	45,000	70%
Clark Building	176,800	95%
Continental Bank	84,000	60%
Riverside Building (Towne Realty)	30,000	85%
Time Insurance (new only)	51,000	51% (of 90,000 sq.f
	1,482,300	Average - 185,250 s

Total Vacancy New Buildings: 123,000 sq.ft.

Specific Vacancy 1970 Buildings:

Continental	40,000 sq.ft.
Time	40,000 sq.ft.
Catholic Knights	20,000 sq.ft.
	100,000 sq.ft.

3310

JSM 11/12/70

PLAINTIFFS' EXHIBIT 499

FIRST WISCONSIN NATIONAL BANK

MEMORANDUM

TO: George F. Kasten, Chairman of the Board
Hal C. Kuehl, President
Richard H. Holscher, Vice President

FROM: John S. Helling, Assistant Vice President

DATE: January 17, 1972

SUBJECT: FIRST WISCONSIN CENTER RENTAL RATES

This report has two parts, an explanation of the rationale used in setting recommended rental rates, and several supporting schedules including one showing the actual rates recommended.

The schedules and rates recommended result from a substantial amount of economic analysis and preparation of pro forma statements. Until early in 1970, nothing more than rough approximations of economic impact had been made. In April, 1970, we prepared some additional estimates so that the First Wisconsin Center impact on earnings could be estimated. In August of 1970, and again in October through November of 1970, the earlier estimates were refined so that a presentation on the entire program could be made to the Board. At that time we made some basic assumptions because the total building program was undefined. These figures were used to analyze such things as adding a second Galleria level and two or three stories at the top. By March, 1971, the decision to capitalize certain expenses and interest during construction had been made so the estimate of capitalization due to base building costs was cranked into the figures.

By May, 1971, not only had the scope of the project been defined but about one third of the contracts had been let. At this point all figures were revised based on budgeted costs, and a much closer estimate of rate levels required to recapture costs was made. During July, 1971, actual floors were measured from plans, and an extensive analysis was made of the impact of charging higher rates on higher floors and of the impact of varying rates within one floor according to corner influence etc. By November, 1971, enough information on costs, scope changes, funds costs, operating costs, and on real estate tax rates was known to calculate the final figures and recommended rates. We knew all along that costs would be such that we would have to charge higher rates than anyone else. Our goal was to set rates competitive in today's market that result in nearly full occupancy as quickly as possible with the *minimum* income objective of recovering our costs.

We are recommending average rates from $9.00 on the lowest available floor to $10.25 on the highest available floor (Schedule A) with a variation from $.10 below the average to $.50 above the average depending on location on a floor. These rates will be from 5.8% to 27.2% higher than MGIC's rates which are presently the highest in town. The MGIC Plaza and the First Federal Plaza are our only competition today as there is virtually no first class office space available east of the river. MGIC's announced rates are $7.90 on a full floor basis or $8.70 on a multi-tenant floor basis including electricity (worth about $.25 per square foot) on a 1972 base year.

(Schedule C compares MGIC and FWC) Full floor means all useable area on a floor is rented including the elevator lobby, the toilets, the closets and hallways. If there is more than one tenant on a floor, these areas become public areas. In order to get the same number of dollars from a floor, an amount has to be added to the rent

for a smaller tenant to pick up the rent from the lobby, etc. that would otherwise be lost. In MGIC's case 11% of their floors are these types of areas so they have to add that to the rate for smaller tenants i.e. $7.90 + 11% = $8.70. The First Wisconsin Center will have to load its full floor rates from 18.5% to 14.5%. Recently Thomas J. Klutznich, Executive Vice President of Urban Investment & Development Company, MGIC's partner, spoke to the Milwaukee BOMA about their project. At that time he indicated they were negotiating on about 30,000 square feet of space out of a total of 170,000 square feet. First Federal Savings & Loan Association announced a new building of 169,000 square feet of which 125,000 square feet will be competitive space available. Their rate will be $8.50. This leads us to believe that MGIC may even be forced to drop their rates when our rates are announced in order to fill their building despite the existing differential. We feel our rates are justified by virtue of the building's size, location, height, and prestige of its owner and tenants, but that they are at the maximum.

Schedule of Rental Rates—1st Class Buildings
East of River

FWC	$9.00 - $10.25	
MGIC	$8.70	(with electricity) (1972 Base Year)
First Federal	$8.50	
Marine	$8.00	(with electricity)
M & I	$7.55	(with electricity)
Van Buren Bldg.	$6.50	Estimated
Juneau Square	$7.00	
Lewis Center	$6.00 - $7.00	
IBM	$6.50 - $7.00	
Mariner Bldg.	$6.50	

Other Buildings are less

In addition to First Wisconsin Center's 400,000 square feet, MGIC's 170,000 square feet, First Federal's 125,000 square feet, there will be about 200,000 square feet of space available in our Water Street quarters. With all this space added to the market at once, the above quoted rates will become competitive factors as tenants leave those buildings for the First Wisconsin Center. We expect to fill better than half of the First Wisconsin Center's 400,000 square feet immediately, but the remaining 200,000 square feet will have to compete with MGIC, First Federal, 735 North Water Street, and the other east side buildings.

We compared income produced from the recommended rate schedule with costs. Costs were split into three areas and estimated separately, real estate taxes, (Schedule D-3), all other operating costs, (Schedule D-2), and costs of funds (Schedule D-1).

Some fundamental assumptions were made regarding costs and income. Probably the most significant was the decision to cover "costs" only and not provide for depreciation (i.e. recapture of capital investment). The theory is that because of market conditions we can only get rents today to cover costs, therefore, for the short term, say five years, can we justify this? If we look at the real issue, the actual value of the asset at the end of five years, we ask if this is really a "wasting asset" over the first five years. In our opinion, the land and building will be worth more after five years than they cost, thus we try to compete in the market, cover costs initially, and increase rents after five years to provide then for depreciation or recapture of investment.

Another fundamental assumption was that rents should reflect only those costs caused by construction of the basic building. Special costs incurred because of the nature of the Bank were ignored. Some of these were, art work,

allowance for special bank improvements, systems department program costs (e.g. communication consultant, one half of the security consultant), portions of the architectural reimbursables, part of the interior design fee, moving costs, and furniture costs. In addition, it was assumed that the areas occupied by the bank would produce income and that the bank's basic rental rate would be the same as the rate for the cheapest tower floors or slightly under this rate. Bank space at the Wisconsin level, Galleria level, parking areas, and drive-in areas reflect market conditions and are different than the basic rate.

The final basic assumption made was that cost estimates would be based on experience for 1970, (later adjusted to 1971). The leases entered into would provide for an escalation of rent to reflect any increased costs between the time the lease was signed and the time of occupancy. Thus we are able to quote rates at today's dollars rather than have to quote rates with a built in estimate of inflation. This is desirable since rent rates for existing buildings are being quoted at today's rates, while generally these buildings' leases have escalator clauses which will cause their rates to increase by the time our building is ready for occupancy.

Real estate tax estimates (Schedule D-3) were based on the 1970 tax rate and an estimate of assessed value made by the assessor's office after reviewing our plans. Subsequent to that time, this estimate was revised upward to reflect the additional cost for a parking deck and inclusion of the land value of one half of the 2nd and 3rd blocks which had been excluded originally. Although there have been scope changes in the building which are likely to increase our taxes, they have been offset by a reduction in the 1971 tax rate so our total budget figure is still good. Two assumptions made in the real estate area were that certain hidden costs of construction would not be reflected in the assessment such as fees, supervision, and tests.

The other assumption is that, on the basic cost of construction, the actual level of assessment will be 48% of cost rather than 55%. This is based on our experience and knowledge of costs and subsequent assessment levels of other new buildings.

The second general area of cost breakdown is all other operating expenses (Schedule D-2). This is cost of labor, utilities, supplies, repairs, etc. This amount is based on our experience at 735 North Water Street. The cost of operating the main office per square foot of net rentable area is applied to the area of the First Wisconsin Center. To this are added the extra costs per square foot for the bank occupied areas—also based on the experience at 735 North Water Street. The actual costs for the first nine months of 1971 were found to be slightly under 1970 experience so we have used the original figures with 1971 as a base year. Thus, both our tax expense and other expense should be current for 1971.

About 55% of all costs are estimated to be cost of funds (Schedule D-1) and it is interesting to note that the cash rent income almost covers the cash costs (taxes and operating) while the cost of funds closely approximates the imputed rent from the bank. Therefore it may be fairly said that the actual occupancy cost to the bank in the new building is slightly more than the loss of interest income on the total capitalization for the building (plus the imputed interest on funds expended but excluded from building economics—like art, etc.). There are several assumptions made on "cost of funds". The most basic is that it is assumed that the funds invested in the new building project could have otherwise been earning income and therefore the new building must be charged with the costs of not investing those funds. This, like bank rent, is an imputed figure, but it reflects the fact that all bank assets can be measured against the costs of doing business. For the First Wisconsin Center, we have assumed that there will

be in excess of $50,000,000 expended at the gross debenture cost of 8.6%. The excess funds are assumed to come out of general banking funds at the average cost of funds for all assets—most recently estimated at 5.9%. Thus, an average cost of interest on every dollar spent is computed. It works out to 7.4%.

We have estimated the rate of fund expenditures for both construction and other expenses, and have applied the annual imputed 7.4% interest charge against the expenditures from time of payment through 1973 when we have assumed that the total project will be closed and set up on the books as an asset. The total building value (Schedule D-1) will consist of three elements, 1) construction costs, 2) other costs charged to the project and capitalized (new building development cost, miscellaneous expense, and real estate taxes during construction), and 3) imputed interest on the first two types of expenses which is also capitalized. The total building value is multiplied by 7.4%, and the answer is the amount charged to the building as cost of funds.

Schedule E estimates the direct and indirect impact of the building on the Bankshares books.

Approval of rental rates is requested in Schedule A.

/s/ *John*
John S. Helling

PLAINTIFFS' EXHIBIT 554

FIRST WISCONSIN NATIONAL BANK
of Milwaukee

5/6/71

Mr. Kasten:

For your information—Marshall-Michigan is foreign money represented by Foley & Lardner; Aetna has first mortgage on the property.

Dick Holscher

PLAINTIFFS' EXHIBIT 472

FOLEY & LARDNER
735 North Water Street
Milwaukee 53202
Telephone (414) 273-0800

May 4, 1971

Mr. Richard H. Holscher, President
First Wisconsin Development Corporation
110 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Dear Dick:

Enclosed for your information is a copy of a memorandum dated May 3, 1971, summarizing the present status of the litigation relating to the Juneau Square property. All information in this memo is a matter of public record in the court proceedings.

Best regards.

Cordially,

/s/ *Bob*
Robert B. Bradley

Enclosure
Copy to: G. F. Kasten
A. C. Little 5/6/71

PLAINTIFFS' EXHIBIT 472-A

MEMORANDUM

TO: MR. BRADLEY
FROM: MR. HUBER

Re: Marshall-Michigan Company, Inc. vs.
Juneau Square Corp.

In March, 1971, Marshall-Michigan agreed, upon certain stipulated conditions, not to enter its $1,050,000 judgment of foreclosure against Juneau Square prior to January

2, 1972. If financing is not obtained for the East Project by that date, Marshall-Michigan is free to proceed immediately to a foreclosure sale, without any right of redemption by any party. If Juneau Square pays Marshall-Michigan $1,050,000, plus interest and advances, prior thereto, we will satisfy our mortgage and judgment and convey our one-half undivided interest in the Existing Project to Juneau Square or its designee.

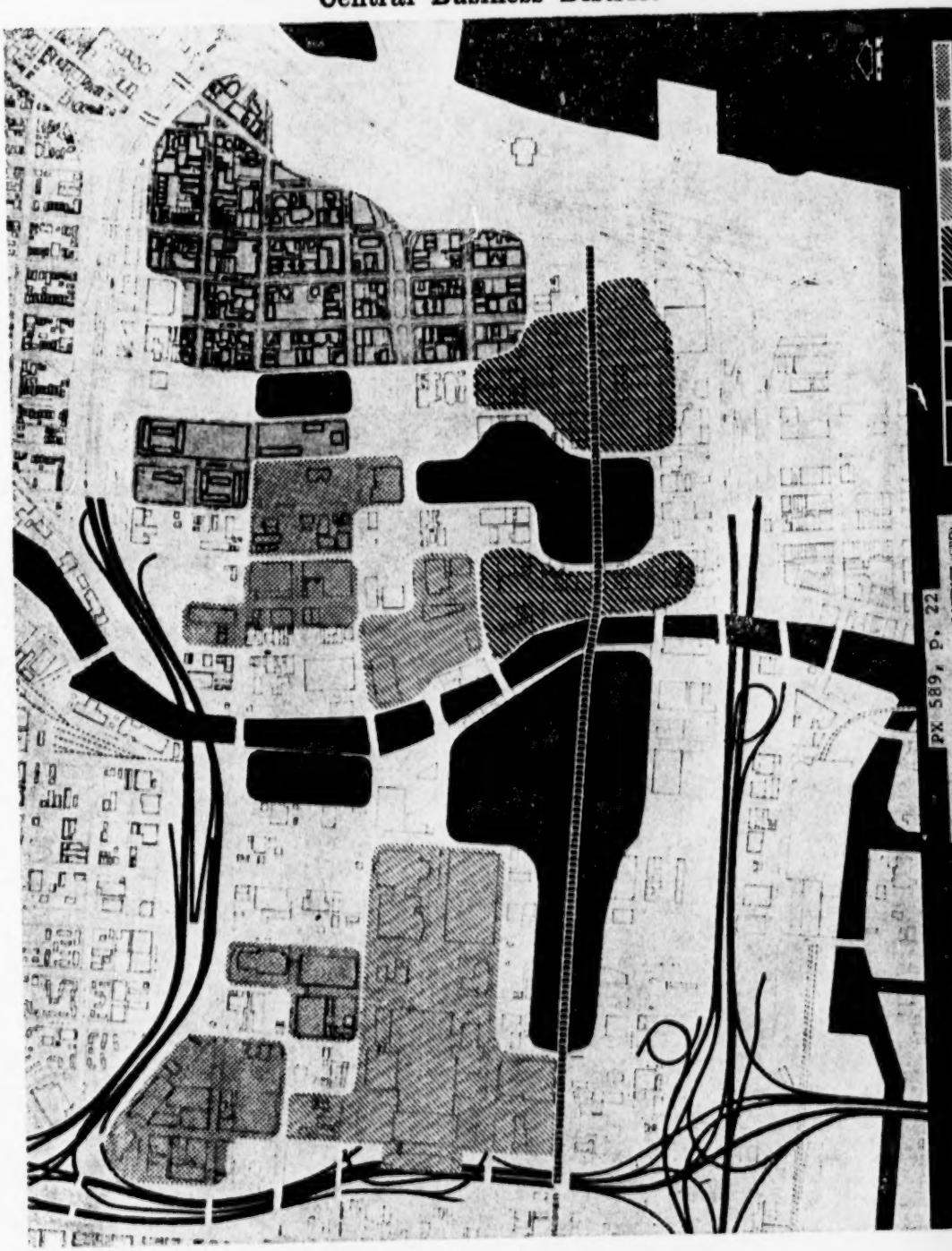
The terms of the Marshall-Michigan/Juneau Square stipulation are similar to a stipulation entered into between Aetna, Juneau Square Corp., and all other defendants, in Aetna's foreclosure suit. Aetna obtained a $4,380,797.11 judgment on its first mortgage, but likewise agreed not to enter its judgment prior to January 2, 1972, unless the time to do so is accelerated under the terms of the stipulation. In the meantime, Buenger-Mariner Management Company has been appointed and presently is managing the property.

If, on January 2, 1972, Marshall-Michigan and/or Aetna become entitled to enter their respective judgments, Marshall-Michigan is to proceed initially to sale and confirmation. Within ten days after confirmation, Marshall-Michigan may, at its option, choose to litigate its defenses relating to the tender of taxes to Aetna. Should Marshall-Michigan so choose and prevail, Aetna must reinstate; should Aetna prevail, Aetna may then enter its judgment of foreclosure and proceed to sale without redemption.

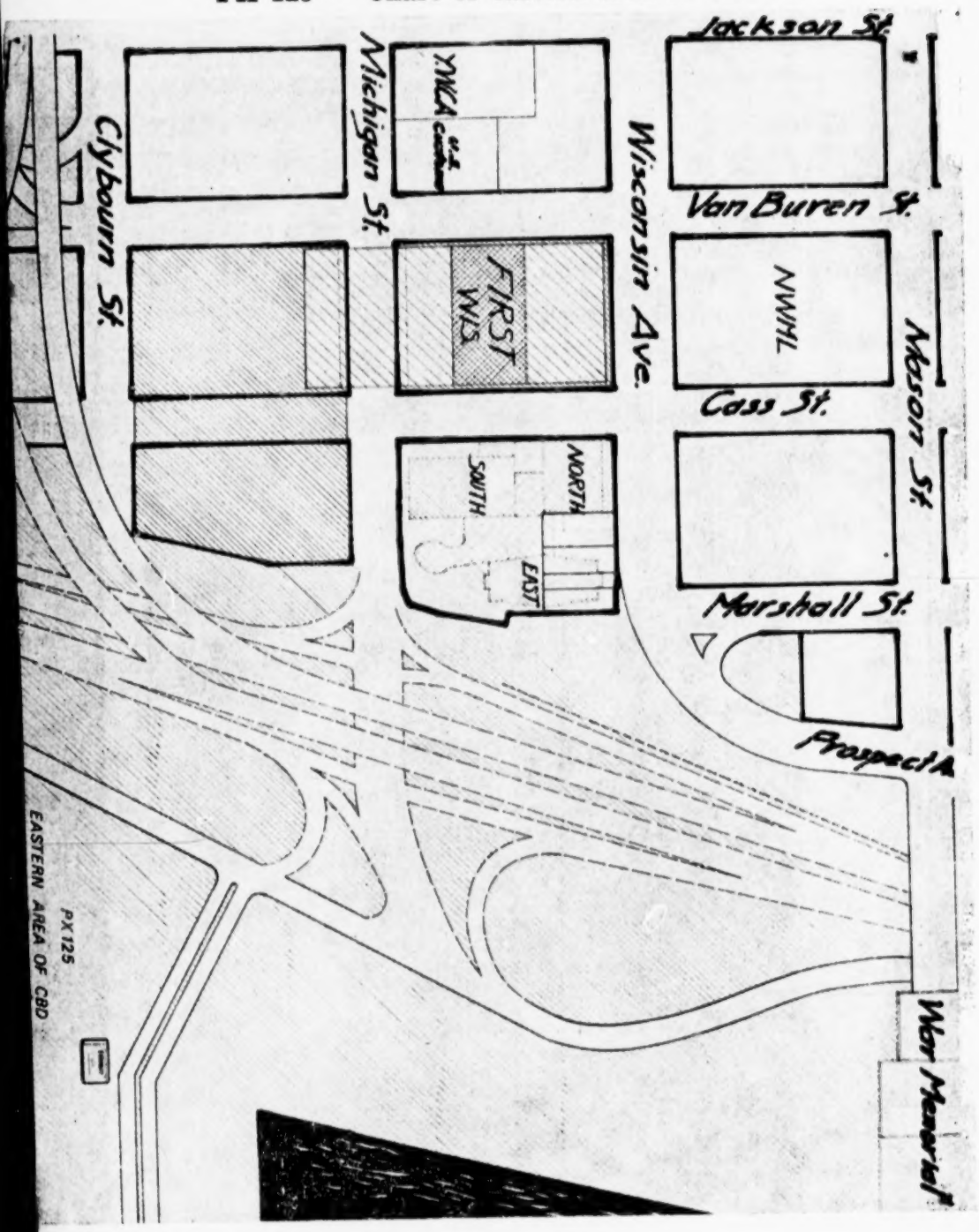
If Marshall-Michigan does not choose to litigate the tax defense, they may redeem by paying Aetna out in full.

As a complete alternative to the above procedure, Marshall-Michigan may, within ten days after confirmation of its sale, elect to reinstate the mortgage by making Aetna current on all its principal and interest and paying to Aetna its costs and disbursements, plus $30,000 attorneys' fees, and a $500,000 mortgage prepayment.

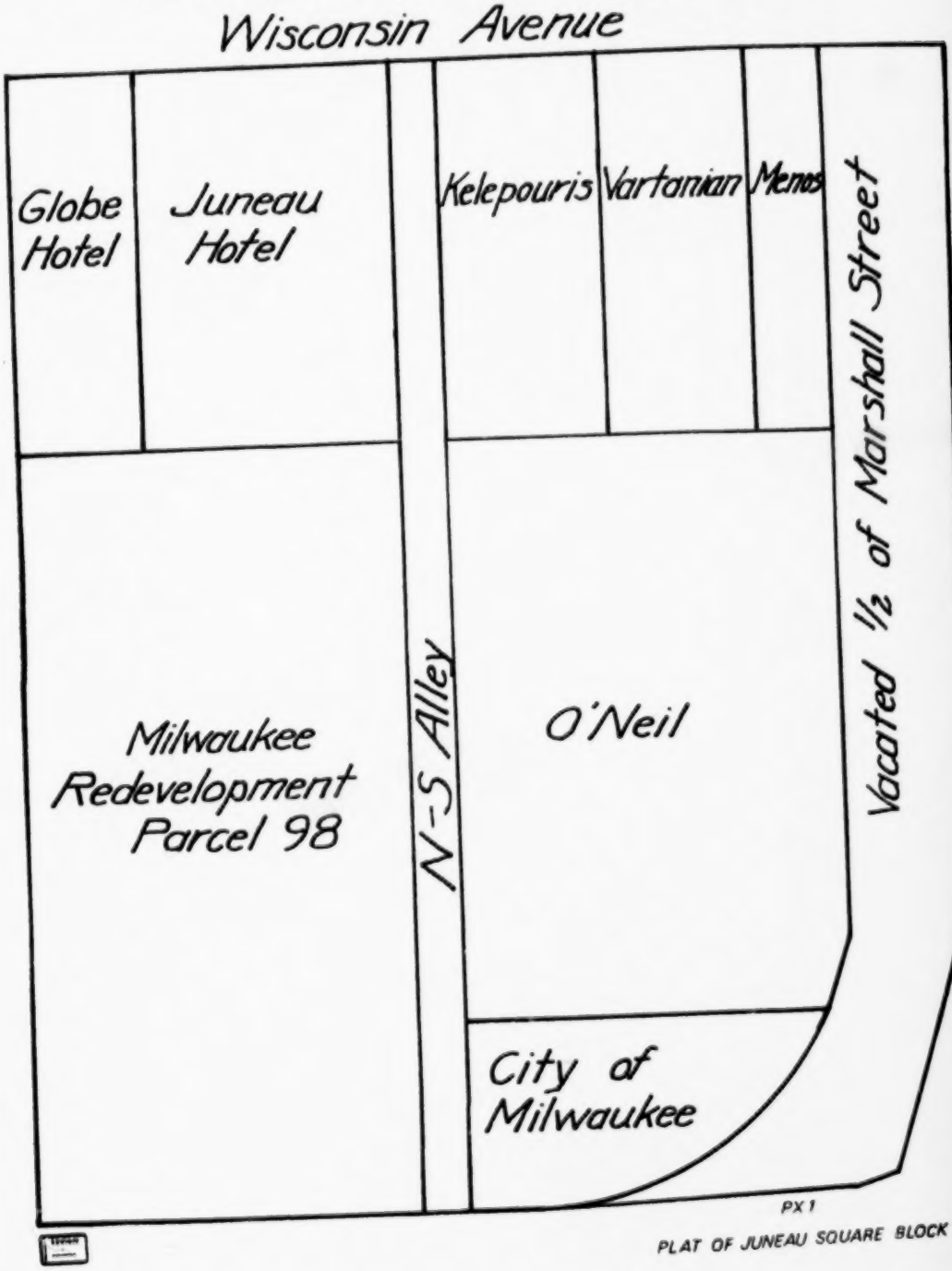
PX 589, page 22 — Chart of Milwaukee Central Business District



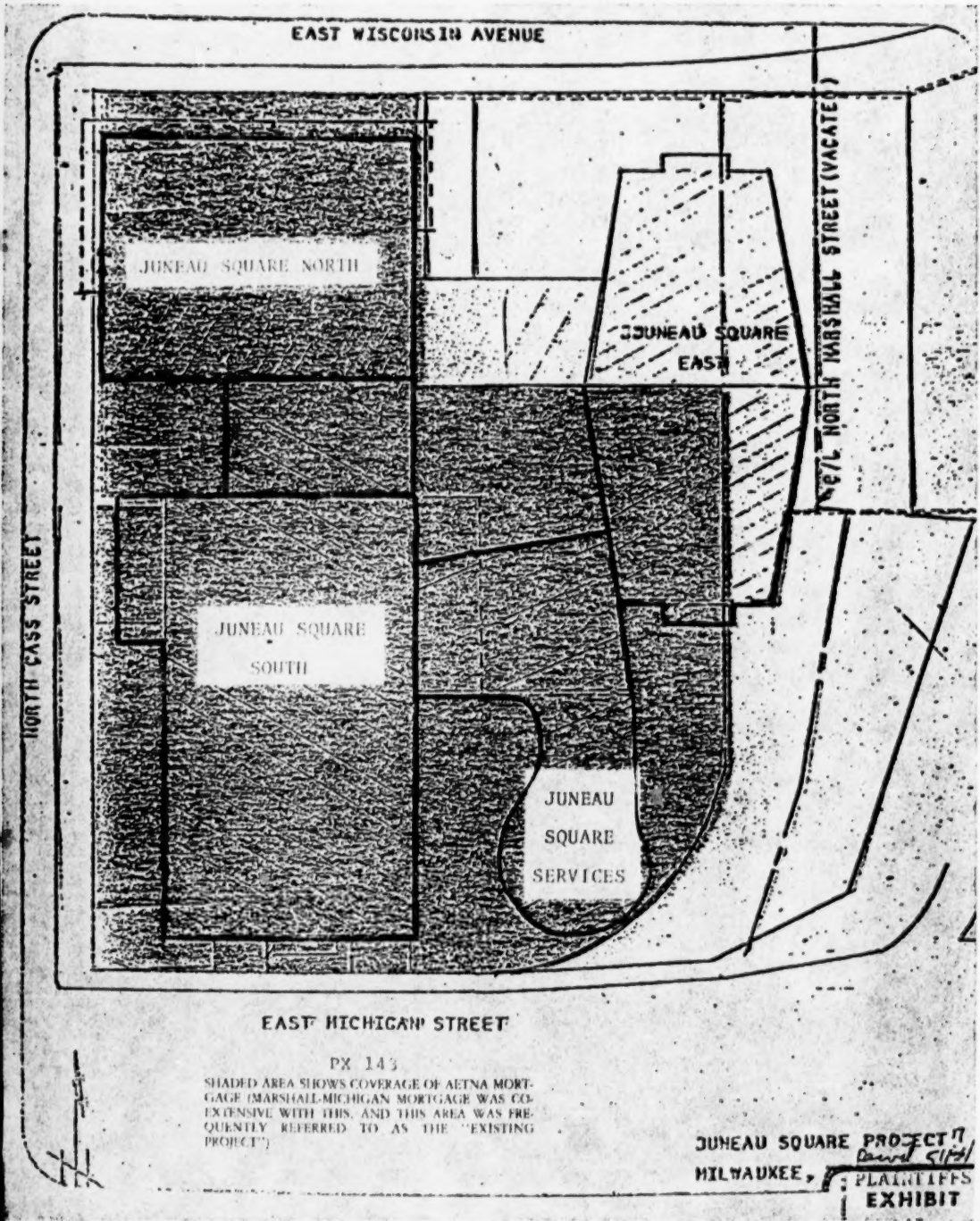
PX 125 — Chart of eastern area of CBD



PX 1 — Chart of parcels in Juneau Square Block



PX 143 — Chart of Juneau Square block showing coverage of Aetna and Marshall-Michigan mortgages



EXCERPTS FROM JURY INSTRUCTIONS— FIRST TRIAL

From pages 13,946-13,948 of the transcript:

As I stated, this is an action under the anti-trust laws. The purpose of the Sherman Anti-Trust Act is to preserve and advance our system of free, competitive enterprise and to encourage, to the fullest extent practicable, free and open competition in the market place; all to the end that the consuming public may receive better goods and services at a lower cost. So, any unreasonable interference by contract or combination or conspiracy with the ordinary and usual freely-competitive pricing or distribution system of the open market in interstate trade and commerce constitutes an unreasonable restraint of interstate trade and is a violation of the Federal Anti-Trust Laws.

* * *

To restrain interstate trade and commerce means then to interfere unreasonably with the ordinary, usual, and freely-competitive pricing or distribution system of the open market in interstate trade and commerce.

From Page 13,957 of the transcript:

The term "restraint of trade" which must be the objective or effect of any contract combination or conspiracy condemned by the antitrust laws contemplates only an unreasonable restraint of trade. The law recognizes that it may be impossible to conduct a business without in some degree restraining trade. The Sherman Antitrust Act, accordingly, does not condemn all restraints, but only those which unreasonably restrain commerce among the states or with foreign nations. The plaintiffs allege, and in order to recover they must prove by a preponderance of the evidence that they were injured or damaged as a result of

the alleged violation by the defendants of the antitrust laws. In other words, the damage or injury which they claim must be proximately caused by the alleged antitrust law violation.

FIRST WISCONSIN DEFENDANTS' INSTRUCTION NO. 25

[FIRST TRIAL]

The term "restraint of trade", which must be the objective or effect of any contract, combination, or conspiracy condemned by the antitrust laws, contemplates only an *unreasonable* restraint of trade. The law recognizes that it may be impossible to conduct a business of any kind without in some degree restraining trade. The Sherman Antitrust Act, accordingly, does not condemn all combinations or conspiracies which interrupt interstate commerce. It does not apply to restraints as such, but only to those which directly, immediately, and necessarily unreasonably affect commerce among the states or with foreign nations.

Restraints of commerce which arise from the full and free play of competition between business concerns all of which have more or less ability, industry, ingenuity, capital, and various other advantages or disadvantages in doing business, are reasonable restraints and in no manner are prohibited or restricted by the antitrust laws. In fact, the very purpose of the antitrust laws is to preserve unrestricted competition which produces such reasonable restraints. The Sherman Act only prohibits unreasonable restraints.

An unreasonable restraint is one which unreasonably or unlawfully interferes with normal, full, and free competitive conduct within the relevant market.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JUNEAU SQUARE CORP., WIL-TEN CO., INC., JUNEAU SQUARE SERVICES, INC., RALPH W. CONWAY, HAL BRADLEY & ASSOCIATES, INC., EMIL BARTEL, ANNA BARTEL, VIONE PERRY, as Administratrix of the Estate of Thomas H. Perry, HAROLD C. SMITH III, as Administrator of the Estates of Harold C. Smith, Jr., and Mildred B. Smith, JACK D. MOERTL and JOHN F. SPODEN,

Plaintiffs,

vs.

Case No. 72-C-533

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, FIRST WISCONSIN DEVELOPMENT CORPORATION, FIRST WISCONSIN CORPORATION, MARSHALL-MICHIGAN COMPANY. INC., MARSHALL-WISCONSIN COMPANY, INC., AETNA LIFE INSURANCE COMPANY,

Defendants.

VERDICT FORM

VERDICT

QUESTION NO. 1

Did any of the defendants enter into any contract, combination, or conspiracy with any other person which was in effect at anytime since September 22, 1968 and which unreasonably restrained interstate trade or commerce in the leasing, development, construction and operation of

office rental space or the financing for the development of office buildings?

Answer YES

If your answer to the above question is "no," then you should not answer any of the following questions. Proceed to the last page and place your signatures on the lines indicated.

QUESTION NO. 2

If your answer to the above question is "yes," identify the line or lines of interstate trade unreasonably restrained by placing a yes answer next to the trade or trades listed below.

A. Leasing, development, construction and operation of office rental space.
Answer YES

B. Financing for the development of office buildings.
Answer YES

QUESTION NO. 3

Identify the defendant or defendants who were members of the contract, combination, or conspiracy found in question number 1 by placing a "yes" answer next to the defendant or defendants listed below.

A. First Wisconsin National Bank of Milwaukee
Answer YES

B. First Wisconsin Development Corporation
Answer YES

C. First Wisconsin Corporation
Answer YES

D. Marshall-Wisconsin Company, Inc.
Answer YES

E. Marshall-Michigan Company, Inc.
Answer YES

F. Aetna Life Insurance Company
Answer NO

QUESTION NO. 4

Was the contract, combination, or conspiracy, as found by you, a substantial and proximate cause of injury to any of the plaintiffs' business or property.

Answer YES

If your answer to the above question is "no," then you should not answer any of the following questions. Proceed to the last page and place your signatures on the lines indicated.

QUESTION NO. 5

If your answer to the above question is "yes," identify the plaintiff or plaintiffs who were injured in their business or property as found in question number 4 by placing a "yes" answer next to the plaintiff or plaintiffs listed below.

A. Juneau Square Corp.
Answer YES

B. Wil-Ten Co., Inc.
Answer YES

C. Ralph W. Conway
Answer YES

D. Hal Bradley & Associates, Inc.
Answer YES

E. Emil Bartel
Answer YES

F. Anna Bartel
Answer YES

G. Vione Perry, As Administratrix of the Estate of Thomas H. Perry
Answer YES

H. Harold C. Smith, III, as Administrator of the Estate of Harold C. Smith, Jr. and Mildred B. Smith
Answer YES

I. Jack D. Moertl
Answer YES

J. John F. Spoden
Answer YES

QUESTION NO. 6

As to the plaintiff or plaintiffs whom you found to have been injured as indicated above, place the sum of money in the spaces provided which would fairly and reasonably compensate the individual plaintiff or plaintiffs for any damages sustained.

A. Juneau Square Corp.
Answer $5,500,000.00

B. Wil-Ten Co., Inc.
Answer $500,000.00

C. Ralph W. Conway
Answer $100.00

D. Hal Bradley & Associates, Inc.
Answer $100.00

E. Emil Bartel
Answer $100.00

F. Anna Bartel
Answer $100.00

G. Vione Perry, As Administratrix of the Estate of Thomas H. Perry
Answer $100.00

H. Harold C. Smith, III, as Administrator of the Estate of Harold C. Smith, Jr. and Mildred B. Smith
Answer $100.00

I. Jack D. Moertl
Answer $100.00

J. John F. Spoden
Answer $100.00

Proceed to the next page and place your signatures on the lines indicated.

We the jury unanimously find the facts to be as indicated in our answer(s) to the foregoing questions.

/s/ *Jerome H. Subeck*
JUROR
/s/ *Edward Volm*
JUROR
/s/ *Robert Schwinn*
JUROR
/s/ *Richard Slavin*
JUROR
/s/ *James Behrendt*
JUROR
/s/ *Carl R. Slye*
JUROR

Dated at Milwaukee, Wisconsin this 1st day of October, 1976.

After you have placed your signatures on the lines indicated, notify the bailiff that you have reached a verdict.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JUNEAU SQUARE CORP., WIL-TEN CO., INC., JUNEAU SQUARE SERVICES, INC., RALPH W. CONWAY, HAL BRADLEY & ASSOCIATES, INC., EMIL BARTEL, ANNA BARTEL, VIONE PERRY, as Administratrix of the Estate of Thomas H. Perry, HAROLD C. SMITH, III as Administrator of the Estates of Harold C. Smith, Jr., and Mildred B. Smith, JACK D. MOERTL and JOHN F. SPODEN,

Plaintiffs.

vs. Case No. 72-C-533

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, FIRST WISCONSIN DEVELOPMENT CORPORATION, FIRST WISCONSIN BANKSHARES CORPORATION, MARSHALL-MICHIGAN COMPANY, INC., MARSHALL-WISCONSIN COMPANY, INC., AETNA LIFE INSURANCE COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,

Defendants.

JUDGMENT

The jury having returned its verdict October 1, 1976 and the Court having considered and decided the motions of the parties on the counterclaims and claims for set-off and having entered its order for judgment this 26th day of October, 1976,

IT IS ADJUDGED AND DECREED AS FOLLOWS:

1. That the plaintiff Juneau Square Corp. recover of the defendants First Wisconsin National Bank of Milwaukee, First Wisconsin Development Corporation, First Wisconsin Corporation, Marshall-Michigan Company, Inc.

and Marshall-Wisconsin Company, Inc., jointly and severally, the sum of $16,500,000, less the set-off of $1,545,346 provided for in paragraph 5 below, making a judgment in the net amount of $14,954,654, plus attorneys' fees and costs of suit to be determined later by the Court pursuant to Section 4 of the Clayton Act (15 U.S.C. Sec. 15).

2. That the plaintiff Wil-Ten Co., Inc. recover of the defendants First Wisconsin National Bank of Milwaukee, First Wisconsin Development Corporation, First Wisconsin Corporation, Marshall-Michigan Company, Inc. and Marshall-Wisconsin Company, Inc., jointly and severally, the additional sum of $1,500,000, plus attorneys' fees and costs of suit to be determined later by the Court pursuant to Section 4 of the Clayton Act (15 U.S.C. Sec. 15).

3. That the plaintiffs Ralph W. Conway, Hal Bradley & Associates, Inc., Emil Bartel, Anna Bartel, Vione Perry, as Administratrix of the Estate of Thomas H. Perry, Harold C. Smith, III, as Administrator of the Estate of Harold C. Smith, Jr., and Mildred B. Smith, Jack D. Moertl and John F. Spoden each recover of the defendants First Wisconsin National Bank of Milwaukee, First Wisconsin Development Corporation, First Wisconsin Corporation, Marshall-Michigan Company, Inc. and Marshall-Wisconsin Company, Inc., jointly and severally, the additional sums of $300 each, plus attorneys' fees and costs of suit to be determined later by the Court pursuant to Section 4 of the Clayton Act (15 U.S.C. Sec. 15).

4. That the defendant First Wisconsin National Bank of Milwaukee recover of the plaintiffs Wil-Ten Co., Inc., Ralph W. Conway, Jack D. Moertl and John F. Spoden on its counterclaim the amount of $111,760, principal, and $117,856, interest, making a total judgment amount of $229,616, with interest on the principal amount of $111,760 at the rate of twelve (12) percent plus attorneys' fees and

costs allocable thereto and that all collateral and other security and mortgages held by said defendant First Wisconsin National Bank of Milwaukee in connection with or as security for the note which is the subject of said counterclaim shall be released and satisfied upon payment and satisfaction of said judgment.

5. That the amount claimed as set-offs in the "Seventh Defenses" in the answers of the defendants Marshall-Wisconsin Company, Inc. and Marshall-Michigan Company, Inc., based upon the deficiency judgment entered in favor of Marshall-Michigan Company, Inc. on March 20, 1972 in the Circuit Court of Milwaukee County, Wisconsin, in the total amount of $1,545,346 shall be set off against the judgment of Juneau Square Corporation as provided for in paragraph 1 above in satisfaction of said claims for set-off and of said deficiency judgment (and each part thereof), and the judgment which is the subject of said claims for set-off, that is, each and every part of the deficiency judgment entered in favor of Marshall-Michigan Company, Inc. on March 20, 1972 in the Circuit Court of Milwaukee County, Wisconsin (Case No. 375-113) shall be discharged and satisfied and the defendants Marshall-Michigan Company, Inc. and Marshall-Wisconsin Company, Inc. are hereby directed to satisfy said judgment of record in said Court.

6. That the award of attorneys' fees and costs of suit pursuant to Section 4 of the Clayton Act (15 U.S.C. Sec. 15) shall be made later by the Court and added to this judgment as set forth in paragraphs 1, 2 and 3 above.

7. That the claims and causes of action of the plaintiffs against the defendant Aetna Life Insurance Company and the defendant Aetna Casualty and Surety Company be and hereby are dismissed on the merits, with costs.

8. This judgment is entered *nunc pro tunc* as of October 1, 1976 for all purposes, except that for the purposes of making motions for judgment notwithstanding the verdict and/or for new trial and taking an appeal the date of actual entry rather than the *nunc pro tunc* date shall control.

Dated this 26th day of October, 1976.

/s/ *Ruth W. LaFore*
Clerk of Court

Approved:

/s/ *Robert W. Warren*
United States District Judge

"INFERENCE ON INFERENCE" INSTRUCTION

A, "reasonable inference" is defined as a process of reasoning whereby from the facts otherwise admitted or established by the evidence in the light of your common knowledge and experience, a reasonable and logical conclusion may be drawn that a certain fact is true. A reasonable inference is, therefore, to be thoroughly distinguished from a mere guess or conjecture. The law does not permit speculation. Moreover, on the basis solely of one inference so drawn a further inference may not be drawn.

In other words, you may not pile inference on inference, but may draw an inference only from facts or circumstances which you find to have been established by a preponderance of the evidence.

"AETNA NOT CONSPIRATOR" INSTRUCTION

In regard to the membership in the conspiracy alleged, I instruct you that you may not find that Aetna Life Insurance Company was a member of the alleged conspiracy.

"LOSS OF AETNA FINANCING NOT DUE TO CONSPIRACY" INSTRUCTION

Also, in regard to damages in this case, I instruct you that there is insufficient evidence to find that the decision of Aetna Life Insurance Company to decline financing for Juneau Square East was the direct and proximate result of a conspiracy by the defendants in this case; therefore, I instruct you that in assessing the amount of damages, if any, to plaintiffs, you may not award any damages to them based on the March 11, 1969, decision of Aetna to decline the financing.

"IRRELEVANCE OF OTHER ILLEGAL ACTS" INSTRUCTION

During the course of the trial reference has been made to acts on the part of the various defendants and other persons that the plaintiffs claim were done as a part of a conspiracy to restrain trade, so as to injure plaintiffs in their business or property. You are to consider these acts, if you find they were indeed done by the defendants only if you also find that they were done in the course of and in furtherance of a conspiracy to violate the anti-trust laws by unreasonably restraining trade, whether or not these acts were violative of laws other than the anti-trust laws is irrelevant. If any of the defendants have committed any other wrongs and I do not suggest whether they have or have not, you should not consider the character of these acts under laws other than the anti-trust laws as I have defined and explained them in these instructions.

"COMPETITION NOT COMPETITORS" INSTRUCTION

THE COURT: The term "restraint of trade" which must be the objective or effect of any contract, combination or conspiracy condemned by the anti-trust laws contemplates only an unreasonable restraint of trade. The law recognizes that it may be impossible to conduct a business without in some degree restraining trade. The anti-trust laws were enacted for the protection of competition, not competitors. The plaintiffs must, therefore, establish that the defendants' acts injured not only the plaintiffs themselves, but competition in the leasing of office rental space in the central business district of the City of Milwaukee.

"FORECLOSURE LAW' INSTRUCTION

In order to assist you in evaluating the conduct of the parties, the following instructions set forth the applicable law governing various transactions raised by the evidence, reference has been made to the law of real estate mortgages, in fact, you have gotten a short course in the law of real estate mortgages.

The general purpose of a mortgage is to provide a security for payment of a debt or performance of an obligation, thus, if a borrower is not able to pay the amounts due, the lender can look to the value of the property mortgage to obtain payment. The law permits mortgages to be bought and sold and this right to transfer ownership of a mortgage is also important to its value. When a mortgage is in default, several things may occur. Holders of defaulted mortgages may grant the property owner additional time in which to discharge his obligations under the mortgage, but such extensions are entirely voluntary, are not required by law and may be made subject to any conditions the mortgage holder wishes to impose in order to protect its interest. If such an agreement is not made, the holder of the mortgage must invoke the aid of the Court to enforce the provision of it, of this mortgage agreement. The mortgagee is authorized by law to foreclose on that mortgage and requires the property owner to either one, pay the full amount of the debt immediately if the mortgage so provides or two, relinquish to the holder of the mortgage all rights in the mortgaged property.

If the failure to pay real estate taxes constitutes a default under the terms of a mortgage, and the mortgagee is entitled to payment of the full amount of the mortgage upon default, payment of the real estate taxes would not bar the mortgagee from maintaining a foreclosure action.

A foreclosure suit is legal proceeding supervised by a court, rules of equity or fairness are applied to such proceedings to insure fair treatment of both the creditor and the debtor. If the judge finds that the property owner has defaulted on the mortgage, he will enter judgment in favor of the mortgage holder. The law allows the party against whom the judgment was entered to redeem his property by paying the amount of the judgment within one year. If the property is not redeemed, the mortgage holder may then have the real estate sold at a sheriff's sale in order to recover the debt due it. The proceeds of this sale must be applied first to delinquent taxes, if any, then to the holder of the first mortgage and then to the holders of subsequent mortgages, followed by general and other unsecured creditors. The defaulted owner receives nothing unless the sale price is sufficient to first repay all of these obligations.

In regard to the priorities which I have listed above, payment of delinquent taxes by a second mortgagee does not give the second mortgagee priority over the first mortgagee from the tax payment. One who buys property at a foreclosure sale on a second mortgage buys the property subject to all prior claims and mortgages including the delinquent taxes and the first mortgage. Reference has also been made to the legal effect of the consent judgments entered in state court pursuant to the stipulations and settlement agreements. As a general rule these agreements are binding on the parties and have the effect of discharging all claims and matters raised therein. Such agreements are favored by the law and could not be set aside except upon the clearest and most positive proof of fraud or mistake. When such agreements are fraudulently obtained, however, the judgment may be set aside and the parties are now bound by the stipulation and

[SECOND TRIAL]

Plaintiffs' Requested Instruction No. 16.

USE OF UNFAIR METHODS TO DESTROY COMPETITION AS PER SE VIOLATION OF SHERMAN ACT

16-1. Unfair methods of competition, when used as part of a conspiracy the object of which is to destroy the business of a competitor, are in and of themselves unreasonable restraints of trade.

16-2. Under the evidence in this case it is not disputed that First Wisconsin Corporation and First Wisconsin National Bank of Milwaukee, as owners and lessors of commercial office space in the First Wisconsin Center and the Water Street properties, and Juneau Square Corporation, as owner and lessor of commercial office space in Juneau Square North and Juneau Square South, as well as in Juneau Square East had the latter building been constructed, were competitors in the leasing of office space in the central business district of Milwaukee.

If you find that:

(a) There existed an agreement, combination or conspiracy between First Wisconsin Corporation and First Wisconsin National Bank of Milwaukee or between one or both of them and one or more of the other defendants or with any other person; and

(b) That unfair methods of competition were employed as a part of the agreement, combination or conspiracy; and

(c) That the intent of the parties to the agreement, combination or conspiracy was to destroy the plaintiffs as competitors,

such findings without more would require you to answer "Yes" to the questions on the verdict inquiring whether the First Wisconsin Corporation and First Wisconsin National Bank of Milwaukee agreed, combined or conspired to restrain trade. Such findings would also require you to answer "Yes" to similar questions regarding any other defendant who was a party to such agreement, combination or conspiracy.

[SECOND TRIAL]

Plaintiffs' Requested Instruction Number 18.

AETNA/MARSHALL-WISCONSIN AGREEMENT OF APRIL 4, 1972

18-1. The evidence establishes that on January 4, 1972 Aetna Life Insurance Company filed a judgment of foreclosure against Juneau Square Corporation. This judgment stated the amount due Aetna from Juneau Square Corporation was just over $5,100,000, and ordered that the mortgaged premises be sold by the sheriff with the proceeds to be credited against the judgment amount.

18-2. Plaintiffs' Exhibit 330 is a written agreement between Aetna and the defendant Marshall-Wisconsin Company dated April 4, 1972. This agreement contains various terms for a mortgage relationship between Aetna and the defendant Marshall-Wisconsin Company covering the so-called existing project in Juneau Square, which Marshall-Wisconsin was acquiring from the defendant Marshall-Michigan.

18-3. The court finds as a matter of law that the agreement of April 4, 1972 operated to extinguish Juneau Square Corporation's debt to Aetna, so that from and

after that day Juneau Square Corporation was not indebted to Aetna. The court further instructs you that it was the obligation of Aetna and Marshall-Wisconsin promptly to make their agreement a matter of public record or otherwise to advise the Circuit Court of Milwaukee County or Juneau Square Corporation of the agreement, so that the judgment earlier recorded against Juneau Square Corporation, providing for a debt of $5,100,000 from Juneau Square Corporation to Aetna, would not be artificially maintained as a matter of record.

18-4. The court further finds that the defendant Marshall-Wisconsin Company intended that there be a delay and there was delay in recording or otherwise advising the Circuit Court of Milwaukee County or Juneau Square Corporation of the Aetna-Marshall-Wisconsin agreement of April 4, 1972, and that this intended delay constituted an unfair and unreasonable act and agreement by the defendant Marshall-Michigan Company.

18-5. The agreement of April 4, 1972 further provided that Aetna would assign to the defendant Marshall-Wisconsin Company all of Aetna's right, title and interest in, to and under any deficiency judgment which might result in the Aetna foreclosure action. The court finds this to be an illegal, unfair and unreasonable act and agreement by and between Aetna and Marshall-Wisconsin Company.

MEMORANDUM

The April 4, 1972 agreement between Aetna and Marshall-Wisconsin was the subject of frequent briefing and arguments on various motions prior to trial. Various explanations have been attempted by defendants in justification of this agreement and, so far as plaintiffs can tell, they have all been abandoned. No valid explanation has ever been advanced.

The agreement (PX 330) provides in part (p. 6):

> . . . Mortgagee (Aetna) shall cooperate with Purchaser (Marshall-Wisconsin) in terminating the rights of Juneau Square Services, Inc. ("Services") in any part of the Properties, including any rights it may have as a lessee under any lease or under the Stipulation (and Mortgagee shall assign to Purchaser all of its rights against such lessee, to the extent same are assignable), and in obtaining modifications of any leases which are subordinate to the Mortgagor the rights of Mortgagee in the foreclosure proceedings. Mortgagee shall warrant that, to the best of its knowledge, it has not waived any defaults by Services under its lease and/or the Stipulation, and that Services is in substantial default under the terms of its lease and/or the Stipulation. The course of action hereafter taken in the foreclosure proceedings shall take cognizance of the need to effect a termination of Services rights and the above-described modifications. Purchaser shall bear any legal expenses in connection with such termination and modifications.

The agreement also provided (p. 6-7):

> If requested by Purchaser (Marshall-Wisconsin), Mortgagee (Aetna) shall assign to Purchaser all of Mortgagee's right, title and interest in, to and under any deficiency judgment which results in the foreclosure proceedings. Mortgagee shall assign to Purchaser without recourse, the two Promissory Notes executed by Juneau Square Services, Inc. and guaranteed by Jack D. Moertl which were received by Mortgagee with respect to Services' rental obligations, as well as all claims for unpaid rentals or other sums due from Services under its lease and/or the Stipulation.

The agreement also provided (p. 7):

> It is intended that the economics of the foregoing settlement are to be effected immediately although the form of legal implementation of such settlement has not yet been selected. . . .

As of the time this agreement was entered into, Juneau Square Corp., its affiliate Juneau Square Services, Inc. and their associates still were in possession of the service station in the southeast quadrant of Juneau Square. They also still held various rights in the vacant parcels in the northeast quadrant and were embarking upon a development of a building on those parcels to save what they could of the project. The agreement quoted above was structured to permit the defendants to exert maximum economic pressure against the Juneau Square developers and to oust them from the remainder of the block. This purpose is clearly inferrable from the provisions of the agreement and is confirmed in a memorandum found in the Aetna files (plaintiffs' exhibit 330A, p. 1):

> Part of our agreement with Marshall-Wisconsin is to cooperate wherever possible and we have, therefore, agreed to delay the recording of a formal modification agreement until such time as they have had an opportunity to work out their differences with Moertl/Spoden. Since we will be receiving the benefits of the modification agreement in the interim, Frank Kelly and Jim Urdan feel that we have in no way jeopardized our position.

It is no longer disputed that the April 4, 1972 agreement between Aetna and Marshall-Wisconsin Company operated to extinguish Juneau Square Corporation's debt to Aetna. 47 Am Jur 2d, *Judgments,* Sec. 992; 49 CJS, *Judgments,* Sec. 552; Osborn, *Mortgages,* Sec. 300, p. 861; *People's Nat. Bank of Ellwood City* v. *Weingartner* (Pa. 1943), 33 A.2d 469. In opening statement in the first trial, Aetna's counsel stated (May 5, 1976, 379-380):

> On March 20, 1972, the Circuit Court confirmed the sale . . . Marshall-Michigan Company is now the sole owner of this real estate. At that point, Marshall-

> Michigan Company found a buyer. It sold the land to First Wisconsin Bank. First Wisconsin Bank then approached Aetna Life Insurance Company and said we will pay that debt. We know that you are owed by now over $5,000,000 in back payments, interest, taxes and expenses. We will pay Juneau Square Corporation's debt . . . and the arrangement was made.
>
> First Wisconsin Bank would pay this debt to Aetna Life Insurance Company, and it has been doing so ever since. *As of March—excuse me, approximately April 4, 1972, Juneau Square Corporation has not owed Aetna Life Insurance Company anything.* The debt that it promised to pay was taken over by the First Wisconsin Bank. *It doesn't owe Aetna Life Insurance Company anything anymore,* and no one is asking it to pay anything.
>
> None of the other plaintiffs in the lawsuit ever owed Aetna Life Insurance anything.

The agreement to delay recording of the Aetna/Marshall-Wisconsin agreement, and thereby artificially to maintain the Aetna judgment of record, was self-evidently unfair and unreasonable. It was a fraud upon the court, upon Juneau Square Corporation and upon other creditors of Juneau Square Corporation. The situation is closely analogous to *Kickbush* v. *Corwith* (1901), 108 Wis. 634 85 N.W. 148. That case involved a secret agreement between a mortgagor and a mortgagee whereby the mortgagee agreed not to record his mortgage on the debtors property so as to avoid hurting the debtors credit. The court set the mortgage aside as a fraud on subsequent creditors, since its effect was to mislead. At p. 646 the court stated:

> We perceive no escape from the conclusion that the mortgage was withheld from record by agreement of the parties for the very purpose of giving Leahy a

> false financial standing, and to deceive persons dealing with him, and hence was, under well-settled principles, fraudulent as to creditors so deceived. Blennerhassett v. Sherman, 105 U.S. 100; Collins v. Corwith, 94 Wis. 514; Evans v. Laughton, 69 Wis. 138.

In the instant case the secret agreement not to record the new mortgage had a converse but equally misleading effect: by leaving the earlier Aetna Judgment of record, Aetna and Marshall-Wisconsin held out to the world that a $5,100,000 foreclosure judgment was in effect, and that upon sheriff's sale Juneau Square Corporation would be liable for any deficiency.

This secret agreement was patently unfair and unlawful. Its obvious effect was to restrain substantially all of Juneau Square Corporation's financial dealings.

The court may also wish to consider the existence and purpose of Sec. 270.94 of the Wisconsin Statutes, which provides that after full payment of a judgment, and a refusal to satisfy the judgment on request of the judgment debtor, the judgment creditor is liable for actual damages occasioned by his failure. That is statutory recognition of the injustice of permitting a judgment to remain of record when in fact it is satisfied. The Juneau Square developers had no knowledge of the unrecorded mortgage transactions between Aetna and First Wisconsin. It cannot be disputed that the parties to the transaction intended recording be delayed and that the Aetna judgment be artificially maintained of record for the benefit of First Wisconsin. As a matter of law, that is unfair and unreasonable.

In addition, the provision in the Aetna/Marshall-Wisconsin agreement providing for assignment by Aetna to Marshall-Wisconsin of ". . . any deficiency judgment which

results in the foreclosure proceedings'' (PX 330, p. 6) was also, as a matter of law, unfair and unreasonable.

> As a general rule, in the absence of a statute to the contrary, it is not competent for one of the joint defendants on paying the judgment to take an assignment of it to himself, or, unless under special circumstances, to a third person for his benefit, so as to wield it against his codefendant, and it is none the less extinguished by the payment, although such an assignment is made, unless, according to some authorities, the payment was not intended to have that effect.

Marshall-Wisconsin Company was the successor in interest to Marshall-Michigan (Juneau Square Corp.'s codefendant in the Aetna foreclosure action). The Aetna/Marshall-Wisconsin agreement provided that the latter have any deficiency judgment ''to wield against (its) codefendant (Juneau Square Corp.)''. The predatory nature of this agreement is self-evident.

[SECOND TRIAL]

Plaintiffs' Requested Instruction Number 19.

BANK'S DUTY TO DISCLOSE DECISION TO ACQUIRE CUSTOMER'S PROPERTY

19-1. You are instructed that by virtue of the bank-customer relationship existing between the defendant First Wisconsin National Bank of Milwaukee and the plaintiffs Juneau Square Corporation and Wil-Ten Company, with respect to the Juneau Square development, the bank owed a duty to those customers to advise them of the decision made by it or its parent corporation to acquire the Juneau Square property at the time that decision was made.

19-2. The court finds as a matter of law that the defendant First Wisconsin National Bank of Milwaukee had

notice of the contact made on behalf of First Wisconsin Corporation with Aetna Life Insurance Company through Mr. Shapiro in March 1969, and also notice of the decision of the Executive Committee of First Wisconsin Corporation in November 1969 to attempt to acquire Juneau Square.

19-3. The court finds that the defendant First Wisconsin National Bank of Milwaukee was therefore under a duty beginning in 1969 to communicate the desire or decision of its parent corporation to acquire the Juneau Square property and that it did not communicate that information to the developers of Juneau Square, who were its customers. You are therefore instructed that this violation of the bank's duty constituted an unreasonable and unfair omission on the part of the defendant First Wisconsin National Bank of Milwaukee and on the part of those associated with the bank who knowingly participated in withholding such information.

19-4. If you find that any defendant engaged in such conduct pursuant to and in furtherance of a combination or conspiracy to restrain trade, you may take such conduct into consideration in determining whether such restraint was reasonable.

MEMORANDUM

A national bank is an instrumentality of the federal government, created for a public purpose, namely, to provide a monetary and credit system for the country. 10 Am Jur 2d, *Banks,* Sec. 5, p. 29; *Christopher* v. *Norvell,* 201 U.S. 216; *Merchantile Nat. Bank* v. *New York,* 121 U.S. 138. As a bank the First Wisconsin was the recipient and repository of confidential information from its customers, Juneau Square Corp., Wil-Ten and their associates. In

many respects the bank has a fiduciary relationship to its customer, which may be explained either on the theory that a principal-agent relationship exists in some respects between a bank and its customer, or on the theory that as the continuing recipient of confidential information from a customer, it self-evidently has a relationship of trust and confidence with the customer as to the subject matter of that information. See *Peterson* v. *Idaho First National Bank* (Idaho 1961), 367 P.2d 284; *Bank of California* v. *Hoffman* (1949), 255 Wis. 165; *Milohnick* v. *First National Bank* (Florida 1969), 224 S.2d 759. At a minimum, such a relationship should require the bank to disclose to its customer its intention to acquire the customer's property, or to send him to another bank, when the customer's confidentially supplied business and credit information will not be used against him.

[SECOND TRIAL]

Plaintiffs' Requested Instruction Number 20.

CONFIDENTIALITY OF BANK RECORDS

20-1. Juneau Square Corporation and Wil-Ten Company were customers of the defendant First Wisconsin National Bank of Milwaukee as depositors and as borrowers. Plaintiffs contend that, during the course of that bank-customer relationship, confidential information concerning Juneau Square Corporation, Wil-Ten Company and the Juneau Square development was communicated to the bank by them and placed in the bank's credit files on those companies.

20-2. You are instructed that it was the duty of the defendant First Wisconsin National Bank of Milwaukee to keep any such information confidential and not to reveal it to other persons, including officers or employees of

related or affiliated corporations, without the permission of Juneau Square Corporation or Wil-Ten Company.

20-3. An exception to this prohibition exists for credit inquiries made to the bank by other financial institutions where the bank has reasonable grounds to believe the inquiry is for a legitimate business purpose. In such a case the bank may provide a fair statement of the customer's credit standing. Otherwise, however, the bank is required to respect the confidential nature of its credit file. Inviolate secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors.

20-4. This obligation of confidentiality not only forbade the bank from giving such information to outsiders but also to employees of the bank who were not involved in the credit transactions between the plaintiffs and the defendant bank. By this is meant the bank's duty of confidentiality prohibited giving such confidential information to employees of the bank who were not involved in credit functions or the handling of the accounts of Juneau Square Corporation or Wil-Ten Company at the bank.

20-5. If you find that the bank, through its officers or employees, violated this duty of confidentiality, such violation constitutes an unreasonable and unfair act on the part of the defendant First Wisconsin National Bank of Milwaukee and on the part of those who knowingly received and used such information for purposes not related to credit transactions between it and the plaintiff companies.

20-6. If you find that any defendant engaged in such conduct pursuant to and in furtherance of a combination or conspiracy to restrain trade, you may take such conduct into consideration in determining whether such restraint was reasonable.

MEMORANDUM

John H. Dickens, member of the credit division of the bank having jurisdiction over the Juneau Square Corp. and Wil-Ten accounts (and head of that division for a substantial period of time) elaborately described the confidentiality of the credit files on these companies (T. 7471 et seq.) to the point where they are kept "under lock and key because it's confidential, private information or privileged information." (T. 7472) He listed the officers entitled to look at the credit files—Holscher being notably absent from the list (T. 7472 et seq.). Holscher's duties dealt exclusively with acquisition, development and management of real estate for the First Wisconsin companies and he had no banking function. Nevertheless, he and Shute utilized "insider information" on Juneau Square in connection with the Shapiro contact (P.X. 304). Holscher admittedly used these credit files in developing information for his presentation to the First Wisconsin Bankshares Corporation Executive Committee on November 19, 1969 (T. 7550-7554). As late as October, 1972 the Juneau Square Corp. credit files were being used by Holscher and his associates in Marshall-Wisconsin Company, Inc., even to the extent of passing around the summaries of operating statements and balance sheets of Juneau Square Corp. contained in the bank's credit file (P.X. .....). This constitutes a gross violation of the bank's duty to maintain the confidentiality and privacy of these files. *Milohnick* v. *First National Bank* (Florida 1969), 224 S.2d 759; 10 Am. Jur. 2d, *Banks,* Sec. 332, p. 295; *Peterson* v. *Idaho First National Bank* (Idaho 1961), 367 P.2d 284 states:

> "It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositors' accounts. Inviolate secrecy is one of the inherent and fundamental precepts in the relationship of the bank and its customers or depositors."

A summary of the law is found in the comment on the *Milohnick* case in XXII University of Florida Law Review, p. 482, as well as in the annotation on the *Peterson* case in 92 ALR 2d 900 (Anno: Bank—Disclosure of Information). In Fleming, *"Ethics in Banking"* (Bankers' Monthly Magazine, October 15, 1961) it is stated at p. 40:

> " 'Counting such things as sacred secrets.' There you have the first and one of the most generally accepted ethics of the banking business—or profession—the inviolability of information which the banker acquires about customers in the course of his dealing with them."

The Code of Ethics of Robert Morris Associates, identified by Mr. Dickens as a national association of bank loan officers and credit men, states:

> "1. The first and cardinal principle in credit investigation is to respect the confidential nature of the information received."

It cannot be questioned that the credit files of the plaintiff companies were confidential information to which Holscher and other First Wisconsin officials having nothing to do with the credit transactions between Juneau Square and the bank should not have had access.

[SECOND TRIAL]

Plaintiffs' Requested Instruction Number 21.

HUBER LETTER TO TENANTS

21-1. It is not disputed that on December 26, 1969 Foley & Lardner, by Attorney James O. Huber, acting in behalf of the defendant Marshall-Michigan Company, sent to all tenants of Juneau Square North and Juneau Square South a letter demanding that rental payments be made to a Marshall-Michigan Company account at

Marine National Exchange Bank and not to Juneau Square Corporation. This letter is in evidence as Plaintiffs' Exhibit 164.

21-2. The Court finds that the sending of this letter was illegal and constituted a wrongful interference in the relationship between Juneau Square Corporation and the tenants in Juneau Square North and South.

21-3. Accordingly, you are instructed that the sending of the December 26, 1969 letter to the tenants of Juneau Square North and South was an unfair and unreasonable act on the part of the defendant Marshall-Michigan Company, Inc. and its agents and attorneys, Foley & Lardner and James O. Huber.

21-4. If you find that any defendant engaged in such conduct pursuant to and in furtherance of a combination or conspiracy to restrain trade, you may take such conduct into consideration in determining whether such restraint was reasonable.

MEMORANDUM

This letter is Plaintiffs' Exhibit 164. It is undisputed that Foley & Lardner, by James O. Huber, sent the letter of December 26, 1969 to all tenants of Juneau Square North and Juneau Square South, telling them to pay their rent to a Marshall-Michigan bank account rather than to Juneau Square Corp. The letter stated in part:

> "... Marshall-Michigan Company, Inc., until further notice, hereby makes demand upon you and requires that you pay to it, in care of Marine National Exchange Bank, or to such person as may hereafter be appointed to receive the same, all arrears of rent now due, all rent payable by you for the premises

on January 1, 1970, or the next day of payment of such rent, and all future accruing rents.

• • •

"Please be further advised that in default thereof, Marshall-Michigan Company, Inc., shall pursue such remedies as are allowed by law for the recovery of the same.

FOLEY & LARDNER
By .....
James O. Huber
Attorneys for Marshall-Michigan Company, Inc."

Juneau Square Corp. and its associates were unaware of any plan to send this letter and first learned of it when it was received by the tenants. No application had been made by Marshall-Michigan to any court for authority to send the letter.

As a result of the Huber letter, some of Juneau Square's tenants paid their rent into the Marshall-Michigan bank account; others declined to pay their rent pending clarification of the proper payee; still others ignored the letter and paid the rent to Juneau Square Corp.

Plaintiffs ask the court to determine as a matter of law and to instruct the jury that sending the Huber letter was wrongful. In making such a determination, this court applies Wisconsin law. 28 U.S.C. 1652; *Erie R. Co.* v. *Tompkins* (1938), 304 U.S. 64; 20 Am Jur. 2d, Courts, Sec. 207, pp. 540-543.

Under Wisconsin law it was plainly illegal for Marshall-Michigan to assert a self-help remedy without court authority. The leading case is *Grether* v. *Nick* (1927), 193 Wis. 503, 513, which holds a mortgagee ". . . must invoke the aid of a court of equity" to effect whatever right he may have under the mortgage to collect the rents and profits of the mortgaged premises. See also *First Wisconsin Trust Co.* v. *Adams* (1935), 218 Wis. 406, 410-411; *First Wisconsin Trust Co.* v. *United Co.* (1935), 219 Wis.

241, 242; *Dick & Reuteman Co.* v. *Jem Realty Co.* (1937), 225 Wis. 428, 432-433.

Marshall-Michigan was no more entitled to take the rents by self-help than it was to take general possession of the premises by self-help. *Grether* v. *Nick,* supra, is cited with approval in *Wuorinen* v. *City Federal Savings & L. Asso.* (1971), 52 Wis. 2d 722, which stated at 727-729:

> "... During the pendency of a foreclosure action in this state, where the mortgagor retains title, the mortgagee does not ipso facto by virtue of a default acquire the right to possession of the property or the rents and profits that may accrue.
>
> * * * *
>
> "... Nor does the pledge of rents and profits that was executed by the Wuorinens contemporaneously with the execution of the mortgage entitle the savings and loan association to the rents in the absence of further action and order of the court. In Grether v. Nick we stated:
>
> 'In jurisdictions where the mortgagor retains the legal title and right of possession as here, it follows that the right to collect rents and profits remains in the mortgagor until he is deprived of possession in the manner provided by law, and this notwithstanding the fact that the mortgage may pledge the rents and profits.'
>
> * * * *
>
> "... For a mortgagee to have any possessory rights in property in the absence of a peaceable yielding up of possession, he must petition for and be granted the appointment of a receiver."

Therefore the mailing of the Huber letter of December 26, 1969 was a wrongful interference with Juneau Square Corp.'s relationship with its tenants; it was a wrongful restraint upon payment of the rentals to Juneau Square Corp. by the companies leasing space in Juneau Square. It was therefore unfair, predatory and illegal as a matter of law.

[SECOND TRIAL]

Plaintiffs' Requested Instruction Number 22.

ABUSE OF MORTGAGE FORECLOSURE PROCESS

22-1. You are instructed that the fundamental purpose of a mortgage is to provide a security for payment of a debt or performance of an obligation. Thus, if a borrower is not able to pay the amounts due, the lender can look to the value of the property mortgaged to obtain payment. The law provides a mechanism called foreclosure, whereby a mortgage can be enforced and the property subject to it sold if necessary to enable the creditor to obtain payment. Rules of equity or fairness are applied by the courts to such proceedings to insure fair treatment of both the creditor and the debtor.

22-2. There is nothing inherently wrong with foreclosing a mortgage to enforce one's legitimate right to collect a debt. Indeed the right to foreclose is essential to the ultimate value of a mortgage. Similarly, the law permits mortgages to be bought and sold, and this right to transfer ownership of a mortgage is also important to its value.

22-3. However, where a party embarks upon a program of acquiring mortgages, not for the purpose of investing in the obligations secured thereby but rather for the purpose of obtaining the property covered by the mortgages, he is departing from the purpose for which mortgages exist and the occasion for taking unfair and unreasonable advantage of the owner of the property exists. The basic purpose of a mortgage is to help insure a debt is paid, not to take away a man's property.

22-4. Evidence has been received that a subsidiary of the defendant First Wisconsin Corporation, namely, Marshall-Wisconsin Company, purchased mortgages on vari-

ous parcels in the Juneau Square block in order to foreclose them to acquire title to the parcels. In acquiring the mortgage on the so-called Menos parcel in Juneau Square, Marshall-Wisconsin Company paid a premium, that is, more than the amount due on the note or debt, to obtain the mortgage.

22-5. You are entitled to consider whether or not, under all of the circumstances, that course of conduct by Marshall-Wisconsin Company was calculated to take unfair economic advantage of the plaintiffs. If you so find, you are instructed that that would constitute an unfair and unreasonable course of conduct on the part of the defendant Marshall-Wisconsin Company, Inc.

22-6. If you find that any defendant engaged in such conduct pursuant to and in furtherance of a combination or conspiracy to restrain trade, you may take such conduct into consideration in determining whether such restraint was reasonable.

MEMORANDUM

The purpose of a mortgage is to secure payment of a debt. It cannot even exist in the absence of a debt. *Connor* v. *Conner* (1935), 218 Wis. 336; *Doyon & Rayne Lumber Co.* v. *Nichols* (1928), 196 Wis. 387. Rules of equity apply to the enforcement of a mortgage. *Mutual Federal Savings and Loan Ass'n.* v. *American Medical Services, Inc.* (1974), 66 Wis.2d 210; *Wisconsin Brick and Block Corp.* v. *Vogel* (1972), 54 Wis.2d 321; 59 CJS, *Mortgages,* Sec. 623 p. 1092 and Sec. 678, pp. 1229-1230. "In order that an equity court may act, complainant must have dealt fairly and be ready to do equity. The rights of the parties ordinarily are governed by the law as administered in equity courts; the controversy must be settled on equitable principles." 59 CJS, *Mortgages,* Sec. 608, p. 1075.

These fundamental principles of mortgage law are all ignored by the pattern of conduct adopted by Marshall-Wisconsin Company Inc.—a classic unfair and predatory activity: forcing involuntary sale of another man's property. Such an involuntary sale is of course permissible to allow a bona fide creditor to collect his legitimate debt. Even then, the law's sensitivity to the possibilities for injustice are expressed in a highly structured set of substantive and procedural rules to guarantee fairness to both creditor and debtor. But here Marshall-Wisconsin is not a legitimate creditor whose debt has not been paid and who must therefore look to his security. It bought the notes (and mortgages securing them) when they were *already in default* and at in least one such case even paid a premium for the note. Marshall-Wisconsin never wanted to invest in the note; it wanted the property covered by the mortgage. The policy of the law toward such conduct is well expressed in the classic text, Jones, *Mortgages,* Sec. 2330, pp. 844-845, discussing the power of sale under a mortgage:

> "Generally, the purpose for which the power of sale is given being to afford an additional and more speedy remedy for the recovery of the debt, the mortgagor is by his contract bound to exercise the necessary promptness in fulfilling it, and cannot complain of a legitimate exercise of the power. If in any case it is attempted to pervert the power from its legitimate purpose, and *to use it for the purpose of oppressing the debtor, or of enabling the creditor to acquire the property himself,* a court of equity will enjoin the sale, or will set it aside after it is made." (Emphasis supplied)

[SECOND TRIAL]

Plaintiffs' Requested Instruction Number 23.

COMMENCEMENT OF MULTIPLE LAWSUITS

23-1. In addition to the foreclosure action started on behalf of Marshall-Michigan Company, Inc. against Juneau Square Corp. and others in the Circuit Court of Milwaukee County, Case No. 375-113, Foley & Lardner, as attorneys for First Wisconsin National Bank of Milwaukee, commenced an action entitled First Wisconsin National Bank of Milwaukee v. Wil-Ten Co., Inc., Ralph W. Conway, Jack D. Moertl and John F. Spoden, Milwaukee County Circuit Court Case No. 403-679.

23-2. In addition Foley & Lardner, as attorneys for Marshall-Wisconsin Company, Inc., commenced each of the following actions in the Circuit Court of Milwaukee County:

Marshall-Wisconsin Company, Inc. v. Juneau Square Corp. and others, Case No. 402-077

Marshall-Wisconsin Company, Inc. v. Juneau Square Corp. and others, Case No. 413-205

Marshall-Wisconsin Company, Inc. v. Juneau Square Corporation and others, Case No. 413-206.

23-3. You are instructed that if you find the bringing of these multiple legal actions was calculated to oppress or to take unfair advantage of the Juneau Square developers you may consider that to be an unfair and unreasonable course of conduct on the part of the plaintiffs in those lawsuits and their attorneys.

23-4. If you find that any defendant engaged in such conduct pursuant to and in furtherance of a combination or conspiracy to restrain trade, you may take such conduct into consideration in determining whether such restraint was reasonable.

[SECOND TRIAL]

Plaintiffs' Requested Instruction Number 24.

EFFECT OF STATE COURT'S STIPULATIONS AND JUDGMENTS

24-1. Evidence has been received concerning stipulations (that is, agreements made as a part of legal proceedings) and judgments entered in the state court foreclosure actions involving Juneau Square.

24-2. You are instructed that the fact that such stipulations were made and that judgments were entered thereon in favor of the defendants Aetna Life Insurance Company and Marshall-Michigan Company, Inc. does not in and of itself establish that such stipulations and judgments were proper or binding.

24-3. If you find that the stipulations in question, when viewed with the totality of the other evidence, were made and entered into by the defendants as a part and in furtherance of a conspiracy to violate the Antitrust Laws, then the stipulations and the judgments entered thereon are not lawful and binding. Similarly, if you find that the defendants entered into such stipulations in bad faith or fraudulently, in the sense that they concealed material facts, intended not to fulfill their obligations, or intended to prevent or obstruct the plaintiffs from fulfilling their part of the stipulations, then such stipulations and the judgments entered thereon have no lawful and binding effect. Nor are such stipulations and judgments binding if, regardless of the intentions of the defendants when they entered into the stipulations, they did in fact obstruct or prevent the plaintiffs from fulfilling their part of the stipulations.

24-4. If you find that any defendant engaged in such conduct pursuant to and in furtherance of a combination or conspiracy to restrain trade, you may take such conduct into consideration in determining whether such restraint was reasonable.

MEMORANDUM

This instruction is based upon the Court's memorandum decision on summary judgment herein dated July 14, 1976, pp. 14-17.

[SECOND TRIAL]

Plaintiff's Requested Instruction Number 25.

FIRST WISCONSIN NATIONAL BANK'S CREDIT REPORT TO NEW YORK LIFE INSURANCE COMPANY

25-1. There is evidence the defendant First Wisconsin National Bank of Milwaukee made a credit report to New York Life Insurance Company in early May, 1971 at a time when that company was considering financing for the Juneau Square project. The parties dispute the facts and circumstances leading to and surrounding that credit report and the effect it had. These are all questions of fact which you, the jury, must resolve in accordance with the instructions given you by the court.

25-2. You are instructed that it was the duty of the defendant First Wisconsin National Bank of Milwaukee to respond to any credit inquiry with a credit report that was both fair and accurate. If the report was slanderous, then it was unfair as a matter of law. If it was not slanderous, you must nevertheless determine whether under all the facts and circumstances it was a fair credit report.

25-3. With respect to whether the report was slanderous, you should be guided by the following instructions:

(a) The law presumes, until the contrary appears, that every person has a good moral character and has done nothing to forfeit the good opinion of the community and its confidence and respect. It regards a good reputation as valuable to the possessor thereof.

(b) The word "defame" means to harm or destroy the good name or reputation of a person; to render him infamous or bring him into disgrace.

(c) Any oral communication is slanderous and defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. Such a communication is defamatory if it tends to injure the character of a person or company or subject him to ridicule, contempt, or distruct, or tends to degrade or disgrace him in the eyes of his fellow men.

(d) To constitute a slander, it is not necessary that the defamation should be known to the public generally or even to a considerable number of persons. It is sufficient if it is communicated to a few persons or only to one person other than the person against whom the defamation is directed.

(e) You are not to dwell on isolated parts or portions of the words spoken by the employee of defendant First Wisconsin National Bank of Milwaukee. Rather you are to consider those words as a whole and give proper weight to each and every part of the communication.

(f) You are to consider what are the plain and natural import and meaning of the whole communication uttered by the defendant First Wisconsin National Bank of Mil-

waukee, and to construe these words in the plain and popular sense in which persons of average intelligence and comprehension understand them, in light of all the surrounding circumstances. If the defendant First Wisconsin National Bank of Milwaukee in fact uttered these words, its intention as to their effect is immaterial.

(g) The defendant First Wisconsin National Bank of Milwaukee contends that the words that it uttered to New York Life Insurance Company were true. You are instructed that when truth is relied upon as a defense, it must be as broad as the alleged defamatory utterance; but, while the matter of justification by means of the plea of truth to be of any avail must meet and answer the substance of the defamatory charge, it need not be absolutely the letter and form of the alleged defamatory charge; substantial justification is sufficient.

(h) To constitute justification by means of the plea of truth, such truth must extend to the truth of the publication in the sense in which the statement would be understood by persons of average intelligence and comprehension who heard the alleged slanderous statement, giving to the words used their ordinary and accepted meaning.

(i) The burden of proof to establish the substantial truth of the defendants' statements, concerning the plaintiffs, rests upon the defendants. That is, it is the duty of the defendants to satisfy or convince you to a reasonable certainty, by the greater weight of the credible evidence, of the substantial truth of the alleged slanderous statement.

25-4. Exhibits 391 and 413 are documents from the file of New York Life Insurance Company relating to the Juneau Square financing. They each contain the sentence: "Our source bank" (which means the First Wisconsin

National Bank of Milwaukee) "had a part in the construction lending and found proceeds were not being used as indicated." You are instructed that the court finds as a matter of law that this statement was not true. Accordingly, the defendants cannot rely upon a claim that this statement was substantially true to justify this statement if in fact it was made.

25-5. If you find that the credit report to New York Life Insurance Company was slanderous, then this automatically constitutes a finding that the credit report was unfair. If you find that the report was not slanderous, you must nevertheless determine whether, under all the facts and circumstances, it did or did not constitute a fair credit report.

25-6. You are instructed that if you find the defendant First Wisconsin National Bank of Milwaukee made an unfair credit report to New York Life Insurance Company at the time in question, that constituted an unfair and unreasonable act on the part of the defendant First Wisconsin National Bank of Milwaukee and on the part of each person who participated in that act.

25-7. If you find that any defendant engaged in such conduct pursuant to and in furtherance of a combination or conspiracy to restrain trade, you may take such conduct into consideration in determining whether such restraint was reasonable.

MEMORANDUM

Giving an unfair credit report would be an unfair act, and if slanderous would obviously be unfair as a matter of law. The slander instructions are taken from Wis J I—Civil 25.14 (standard instruction on defamation) and 25.12 (standard instruction on truth as a defense).

Despite numerous and often conflicting attempts to justify this credit report, the First Wisconsin defendants have offered *no* evidence that any money loaned for the Juneau Square project was "not being used as indicated." The attempt to justify this statement by various accusations about loans for Minneapolis development, or additional borrowing (to acquire the Juneau Hotel) in alleged violation of a borrowing prohibition contained in the construction loan agreement do not meet the language from the report quoted above, and therefore are immaterial to the defense of truth as to that statement.

Since there is no credible evidence whatever to justify the statement, the court should instruct the jury as a matter of law that defendants have not met their burden and that the above statement is therefore not true.

[SECOND TRIAL]

Plaintiffs' Requested Instruction Number 26.

MARSHALL-MICHIGAN/MARSHALL-WISCONSIN AGREEMENT TO CIRCUMVENT COURT INJUNCTION

26-1. The evidence is undisputed that when Marshall-Michigan Company sold its interests in Juneau Square to Marshall-Wisconsin Company in the spring of 1972, officers of Marshall-Michigan agreed that, if the agreement of sale was enjoined by a court, they would recommend to the company's shareholders that all of the stock in Marshall-Michigan be sold to Marshall-Wisconsin upon the same economic terms as the assets were to be sold under their March 25, 1972 agreement.

26-2. This constituted an agreement to circumvent a possible court injunction and the court finds that such an agreement was illegal.

26-3. You are therefore instructed that the agreement just referred to was an unfair and unreasonable act on the part of Marshall-Michigan Company, Marshall-Wisconsin Company and each person who participated in making such agreement.

26-4. If you find that any defendant engaged in such conduct pursuant to and in furtherance of a combination or conspiracy to restrain trade, you may take such conduct into consideration in determining whether such restraint was reasonable.

MEMORANDUM

The agreement to circumvent a possible injunction against the sale of assets was on its face a fraud upon the court. Like any contract designed to circumvent, evade or misuse the legal process, this is contrary to public policy and therefore illegal. *Griffith* v. *Harris* (1962), 17 Wis.2d 255 (contract to provide favorable testimony held illegal); *Lowe* v. *Crocker* (1913), 154 Wis. 497 (contracts to manipulate claims to achieve procedural advantage in insolvency proceedings held illegal); see also *Rock* v. *Ekern* (1916), 162 Wis. 291; 17 Am Jur 2d, Contracts, Sec. 180, p. 543.

Therefore, in each of the respects stated above, the March 25, 1972 agreement between Marshall-Michigan and Marshall-Wisconsin was unfair, predatory and illegal.

[SECOND TRIAL]

Plaintiffs' Requested Instruction Number 27.

MARSHALL-MICHIGAN'S SALE OF ONE-HALF ITS DEFICIENCY JUDGMENT TO MARSHALL-WISCONSIN

27-1. The evidence is undisputed that as part of the transaction whereby Marshall-Michigan Company sold its interests in Juneau Square to Marshall-Wisconsin Company in the spring of 1972, Marshall-Michigan assigned one-half the deficiency judgment it then held against Juneau Square Corporation to Marshall-Wisconsin Company.

27-2. You are instructed that the court determines such an agreement is illegal and that the assignment constituted an unfair and unreasonable act on the part of both Marshall-Michigan Company and Marshall-Wisconsin Company.

27-3. If you find that any defendant engaged in such conduct pursuant to and in furtherance of a combination or conspiracy to restrain trade, you may take such conduct into consideration in determining whether such restraint was reasonable.

MEMORANDUM

The assignment of a *part* of a judgment is invalid and illegal without the consent of the judgment debtor because such an assignment subjects the debtor to a multiplicity of enforcement attempts with respect to a single judgment. 46 Am Jur 2d, *Judgments,* Sec. 896, p. 1030. As expressed in 49 C.J.S., Judgments, Sec. 520, n. 17, p. 972,

"The judgment debtor should not be obliged and forced to withstand numerous vexations and expensive proceedings brought at various times by different persons under one judgment."

Whether partial or whole, the assignment here is predatory on its face and illegal per se since its obvious purpose was to provide the assignee, a subsidiary of First Wisconsin Corporation, with additional leverage and power to accomplish its will against the judgment debtor.

[SECOND TRIAL]

Plaintiffs' Requested Instruction Number 28

EXTORTIONARY DEMANDS ON NOTE

28-1. The plaintiffs claim that following acquisition of the existing Juneau Square project by Marshall-Wisconsin Company, Inc. in April, 1972, James O. Huber, Robert B. Bradley and/or Richard H. Holscher, acting in behalf of the defendants Marshall-Wisconsin and First Wisconsin National Bank, demanded that Jack D. Moertl and John Spoden cooperate to effect the transfer to Marshall-Wisconsin of interests controlled by clients of Mr. Moertl in the so-called Menos, Vartanian and Kelepouris parcels in the northeast quadrant of the Juneau Square block, in return for which they would release Mr. Moertl and Mr. Spoden from personal liability on a note held by the bank. Plaintiffs further claim that their attempt to negotiate settlement of the bank's claim on the note as a separate matter was rejected by those defendants.

28-2. The law prohibits banks from attempting to coerce conduct with respect to unrelated matters by tying them to a loan transaction between the bank and the person sought to be coerced.

28-3. If you find that Mr. Huber or Mr. Bradley or Mr. Holscher did, in behalf of Marshall-Wisconsin Company and First Wisconsin National Bank attempt to coerce Jack D. Moertl into ccoperating to effect Marshall-Wisconsin Company's acquisition of the parcels referred to by threats or by inducements tied to the note held by the bank, such conduct is in and of itself unreasonable and illegal.

28-4. If you find that any defendant engaged in such conduct pursuant to and in furtherance of a combination or conspiracy to restrain trade, you may take such conduct into consideration in determining whether such restraint was reasonable.

MEMORANDUM

Antitrust-tie-in provision: Sec. 106 (b) of 1970 amendments to Bank Holding Company Act, 12 U.S.C. Sec. 1972; Regulation Y, Bank Holding Companies, 12 CFR, Sec. 225.4 (c).

Antitrust-tie-in provision as an antitrust law: Baker, "Holding Companies After the Hunt," *ABA Antitrust Journal,* Vol. 42, No. 3, p. 709, at p. 717.

DEFENDANTS' PROPOSED INSTRUCTION NO. 19A

(Filed June 12, 1978)

Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.* In order to recover under Section 4 of the Clayton Act the plaintiffs must demonstrate that there was injury to competition, not merely injury to a competitor, and that the injury resulted not simply from the violation alleged but reflects the anti-competitive effect either of the violation or of anticompetitive acts made possible by the violation.** I instruct you that the antitrust laws were enacted for the protection of competition, *not* competitors.*** Therefore, you must find in favor of the defendants unless plaintiffs have proven that defendants' acts injured not only Juneau Square Corp. and/or the other plaintiffs, but competition in the Milwaukee office rental real estate market as well.

Authority:

* *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262 n.14 (1972).

** *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 697 (1977).

*** *Ibid.*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 72-C-533

JUNEAU SQUARE CORP., RALPH W. CONWAY, HAL BRADLEY & ASSOCIATES, INC, EMIL BARTEL, ANNA BARTEL, VIONE PERRY as Administratrix of the Estate of Thomas H. Perry,

Plaintiffs,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, FIRST WISCONSIN DEVELOPMENT CORPORATION, FIRST WISCONSIN CORPORATION, MARSHALL-MICHIGAN COMPANY, INC., MARSHALL-WISCONSIN COMPANY, INC.,

Defendants.

VERDICT FORM
(Filed June 19, 1978)

ORIGINAL

QUESTION NO. 1

Did any of the defendants enter into a contract, combination, or conspiracy with any other person which was in effect at any time since September 22, 1968, and which unreasonably restrained interstate trade or commerce in the leasing of office rental space in the central business district of Milwaukee?

Answer: No.

If your answer to the above question is "yes," then answer the following questions. If your answer to the above question is "no," then you should not answer any of the following questions, but should proceed to the last page and place your signatures on the lines indicated.

QUESTION NO. 2

Identify the defendant or defendants who were members of the contract, combination, or conspiracy found in question number 1 by placing a "yes" answer next to the name of such defendant or defendants listed below.

A. First Wisconsin National Bank of Milwaukee
Answer:.....

B. First Wisconsin Development Corporation
Answer:.....

C. First Wisconsin Corporation
Answer:.....

D. Marshall-Wisconsin Company, Inc.
Answer:.....

E. Marshall-Michigan Company, Inc.
Answer:.....

QUESTION NO. 3

Was the contract, combination or conspiracy as found by you, a proximate cause of injury to the business or property of any of the plaintiffs listed below?

A. Juneau Square Corporation
Answer:.....

B. Ralph W. Conway
Answer:.....

C. Hal Bradley & Associates, Inc.
Answer:.....

D. Emil and Anna Bartel
Answer:.....

E. Vione Perry, as Administratrix of the Estate of Thomas H. Perry
Answer:.....

If your answer to all subdivisions of the above question is "no," then you should not answer the following question. Proceed to the last page and place your signatures on the lines indicated.

QUESTION NO. 4

As to each plaintiff or plaintiffs whom you found to have been injured as indicated above, place the sum of money in the spaces provided which would fairly and reasonably compensate such plaintiff or plaintiffs for any damages sustained.

A. Juneau Square Corporation
Answer: $.....

B. Ralph W. Conway
Answer: $.....

C. Hal Bradley & Associates, Inc.
Answer: $.....

D. Emil and Anna Bartel
Answer: $.....

E. Vione Perry, as Administratrix of the Estate of Thomas H. Perry
Answer: $.....

Place your signatures on the lines indicated below.

We the jury unanimously find the facts to be as indicated in our answer(s) to the foregoing questions.

/s/ *James A. Greene*
JUROR

/s/ *Helen E. Herr*
JUROR

/s/ *Richard A. Hadler*
JUROR

/s/ *Carol J. Miller*
JUROR

/s/ *Pamela A. Bonnell*
JUROR

/s/ *Lillie R. O By*
JUROR

Dated at Milwaukee, Wisconsin this 19th day of June, 1978.

After you have placed your signatures on the lines indicated, notify the bailiff that you have reached a verdict.

UNITED STATES DISTRICT COURT
For The
Eastern District of Wisconsin

Civil Action File No. 72-C-533

JUNEAU SQUARE CORP., et al

vs.

FIRST WISCONSIN NATIONAL BANK
OF MILWAUKEE, et al

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Robert W. Warren, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, on June 19, 1978.

It is Ordered and Adjudged that all the claims of the plaintiffs in this action are hereby dismissed. All counterclaims of the defendants are also dismissed.

Defendants are to recover the costs of this action.

APPROVED:
/s/ *Robert W. Warren*
U.S. District Judge

Dated at Milwaukee, Wisconsin, this 3rd day of November, 1978.

/s/ *Ruth W. LaFave*
RUTH W. LaFAVE
Clerk of Court

Excerpt from Brief of Plaintiffs-Appellants Filed in Their Appeal to the United States Court of Appeals for the Seventh Circuit

ARGUMENT

PART ONE

THE FIRST VERDICT SHOULD BE REINSTATED

I. THE ORDER FOR A NEW TRIAL IS REVIEWABLE.

The trial court issued two decisions setting forth its reasons for granting a new trial: the Memorandum and Order of July 29, 1977, (App. 224), and the decision denying the plaintiffs' motion under 28 U.S.C. Sec. 1292(b) for an interlocutory appeal of the new trial order (App. 246).

After a new trial has occurred and final judgment entered, the appellate court on appeal from the final judgment can review the new trial order and reinstate the original verdict. *Dassinger* v. *South Cent. Bell Tele. Co.*, 537 F.2d 1345 (5 Cir., 1976).

This part of the brief sets forth the errors and abuse of discretion which resulted in the new trial order.

II. THE CLAIMED FAILURE TO INSTRUCT ON PUBLIC INJURY WAS NOT A PROPER GROUND FOR A NEW TRIAL.

The court concluded there was evidence to show the restraint tended or was reasonably calculated to prejudice the public interest (App. 238). However, the Court then stated:

> It is dobutful whether the jury actually considered this matter in arriving at its verdict. While the jury was instructed that the plaintiffs must prove that the conspiracy resulted in an unreasonable restraint of trade, no reference was made to the requirement that there be some proof of public injury. In light of the complexity of the instant case and the importance of this issue, the Court should have provided further clarification for the jury.
>
> * * * * *
>
> The complexity of the evidence and the legal issues are discussed in part II of this memorandum and order. *The Court's failure to instruct on the issue of public injury was taken into consideration in ruling on the motions for a new trial.* (n. 16) (Emphasis added.)

The court erred in granting a new trial on the basis of the claimed instructional error for the reasons discussed below.

A. *The Defendants did not Preserve a Record in Respect to the Claimed Instructional Error.*

Defendants did not request an instruction stating that "there be some proof of public injury" or that the plaintiffs must prove a restraint which "tended or was reasonably calculated to prejudice the public interest." The instructions given on this issue *were as requested by the defendants.* The court's instructions were virtually a literal adoption of the defendants' requested instruction No. 25 (13,946-947 and 13,957; App. 310-12).

There was no objection by defendants to satisfy F.R. Civ.P. 51, requiring express, specific and timely objection to giving or failing to give an instruction.

B. *The Court did not have Power to Grant a New Trial Sua Sponte in the Interest of Justice or on the Grounds of Supposed Instructional Error.*

The court indicates it granted a new trial in the interest of justice (App. 252, 261); it also specifically considered the supposed instructional error and further speculated the jury may have been confused (App. 238, n.16; 242). None of these grounds was included in the defendants' new trial motions (S.App. 564).

F.R.Civ.P. 59(d) states:

> d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. *After giving the parties notice and opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion.* In either case, the court shall specify in the order the grounds therefor. (Emphasis added.)

The court had power to order a new trial in the interest of justice or for either of the stated specific grounds only if within ten days of the judgment or upon notice and hearing. The new trial was ordered nine months after judgment and there was no notice and hearing.

Lapiczak v. *Zaist,* 451 F.2d 79, 80 (2 Cir. 1971) held the court may not extend the time for taking any action under Rule 59(d) except to the extent and under the condition stated in it. Rule 6(b) F.R.Civ.P. The court further held the Rule 6(b) prohibition against enlargement of time provided for action under Rule 59(d) ". . . has been consistently held to the mandatory and jurisdictional and it cannot be circumvented regardless of excuse," citing *United States* v. *Robinson,* 361 U.S. 220, 229 (1960).

The new trial order here was jurisdictionally invalid.

C. *The Trial Court Erred on the Merits in Respect to The Claimed Instructional Error.*

1. *It was error for the court to speculate the jury may not have considered the competition factor.*

The Court said, "It is doubtful whether the jury actually considered this matter [of injury to competition] in arriving at its verdict" (App. 238). Such speculation was error. *Opper* v. *United States,* 348 U.S. 84, 95 (1954); cf. *United States* v. *Pappia,* 560 F.2d 827, 841 (7th Cir. 1977).

There was no justification for this speculation. The plaintiffs introduced extensive evidence of injury to competition, including the evidence summarized at pages 6-12, 12-16, and 12-35, above. It was the principal area of questioning of key witnesses (Kasten, Mundt, Martin and much of Holscher's testimony). It was a principal area of contest during the trial (see, e.g., trial court's decision on defendants' anticompetitive motive at App. 234-235). It was the subject of key exhibits, such as Kasten memoranda (PX 537 through 544, S.App. 519-526), the Helling rent rate memorandum (PX 499, S.App. 493), the Holscher rent study (PX 498, S.App. 490), a number of comprehensive market studies such as PX 446, 496, 520, 521, 522, 589, 590, 591, and numerous related exhibits, such as PX 290, 291, 295, 497, 500 through 506 and 593, all bearing importantly upon competitive conditions in the market and the impact of variances in office space supply and rental rates thereon caused by the space being supplied, controlled or kept off the market by the First Wisconsin defendants.

2. *The tendency to injure competition was present in this case as a matter of law.*

As recognized by the court, the conspiracy, even if limited to the destruction of competition from Juneau Square, transferred 142,000 square feet of competing office rental space to the defendants and prevented construction of an additional 300,000 square feet of office space. The defendants' memorandum establishing their rent rates (PX 499, S.App. 493) shows those rates were based on the limited remaining competition, evidence that was expressly accepted as sufficient by the trial court (App. 238). No evidence was introduced by the defendants to the contrary.

The largest competitor in the market destroyed and absorbed what would have been the second largest competitor (see pp. 11-12 above). There can hardly be a factual dispute this had at least a tendency to injure competition.

3. *There is no "public injury" requirement.*

In *Radiant Burners Inc.* v. *Peoples Gas Light and Coke Co.*, 364 U.S. 656 (1961), this Court had found (273 F.2d 196, 200) no per se violation and no allegations of general injury to the competitive process. The Supreme Court reversed on the ground the conduct involved was a group boycott and illegal per se. The court said (at p. 660), without apparent limitation,

> Therefore, to state a claim upon which relief can be granted under . . . [Sec. 1 of the Sherman Act], allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires.

In *In Re McConnell,* 370 U.S. 230, 231 (1962), this court's ruling in *Paramelee Transportation Co.* v. *Keeshin,* 292 F.2d 310 (1961), to the effect that a private antitrust plain-

tiff must prove economic injury to the public was held to be

> . . . an erroneous holding since we have held that the right of recovery of a plaintiff in a treble damage antitrust case does not depend at all on proving an economic injury to the public.

In *Switzer Bros. Inc.* v. *Locklin* (7 Cir. 1962), 297 F.2d 39, 47; cert. den. 369 U.S. 851 (1962) this Court held:

> Appellants' attack is spearheaded by the argument that the evidence does not support finding 28 that the general public was damaged by appellants' conduct. . . . We reject that argument upon the record, and we note, also, that the argument is specious even if the finding of public injury were not supported by the record. Congress has determined that public injury is inherent in every monopolistic practice or restraint of trade in violation of the Sherman Act. Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 211, 79 S. Ct. 705, 3 L.Ed.2d 741. In a treble damages action under the Clayton Act the statutory criteria for recovery are satisfied when a plaintiff has alleged and proved an unlawful restraint of trade and damage to himself growing out thereof.

See also *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 16 1964).

III. THE TRIAL COURT MISAPPLIED THE "WEIGHT OF THE EVIDENCE" TEST AND MISCONSTRUED AND OVERLOOKED IMPORTANT EVIDENCE.

A. *The Trial Court Misapplied the "Weight of the Evidence" Test.*

In reviewing the record, the court omitted much important evidence, mistook other evidence, and accepted as true various denials and explanations by defense witnesses which the jury had every right to disbelieve. In their application for an interlocutory appeal under 28 U.S.C.

1292(b) plaintiffs pointed out some of these errors. In denying the application, the trial court responded (App. 251):

> The Court's prior opinion *adopts a view of the case based on the evidence presented at trial.* The plaintiffs have not argued to the contrary.* The fact that the plaintiffs do not agree with the characterization or that the jury *was not required to adopt it* cannot serve as a basis for this Court to certify its order for appeal. (Emphasis added.)

The Court went on to say (App. 252):

> What the plaintiffs are requesting then is a certification of a discretionary decision by this Court *as to the view of the evidence which it adopted* and the facts which it considered in evaluating the overall setting of the case. When reviewed by the appellate court, the decision will be reviewed for an abuse of this Court's discretion. *As to the view of the evidence adopted by the Court, it is supported by substantial evidence in the record.* Whether or not this Court abused its discretion in adopting this view is not in the Court's opinion subject to a difference of opinion. (Emphasis added.)

The court thus arrived at its own verdict, so to speak, and discarded the jury's verdict because it was not consistent with the court's. Although the court adverted to the traditional prohibition against "acting as a thirteenth juror" and substituting its view of the evidence for that of the jury, that is exactly what the court did as the foregoing quotations make plain.

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* Plaintiffs' 1292(b) brief having argued strongly against the view of the evidence taken by the trial court, we do not understand the court making this statement.

The Seventh Amendment prohibits re-examination of any "fact tried by a jury . . . (other) than according to the rules of the common law." It is fundamental that the trial judge may not interfere with the verdict unless the jury has reached a seriously erroneous result. 6A Moore's *Federal Practice,* para. 59.08 (5) at 59-160; 11 Wright & Miller, *Federal Procedure and Practice,* Sec. 2806 at 49. A jury verdict is not to be set aside if it is one which could reasonably have been reached or unless it is "clearly, decidedly, and overwhelmingly against the weight of the evidence." *Schybinger* v. *Interlake Steamship Company,* 273 F.2d 307, 312 (7 Cir. 1959); *Duncan* v. *Duncan,* 377 F.2d 49, 52 (6 Cir. 1967); *Champion Home Builders* v. *Shumate,* 388 F.2d 806, 808 (10 Cir. 1967).

The court does not say the jury reached an erroneous result. Indeed, the court expressly found:

> . . . the Court has carefully weighed the evidence and is of the opinion that there is sufficient evidence to support the finding of the jury [that the conspiracy existed] (App. 234).

Also,

> With respect to the trade of office rental space, the plaintiffs offered evidence to the effect that the defendants conspired to eliminate them as potential competitors. The defendants denied that they were so motivated, but the jury has found to the contrary. The court, as noted above, has reviewed the evidence and is unable to say that this finding was erroneous as a matter of law (App. 237).

Instead of honoring the jury's findings, expressly found to be supported by the evidence, the court substituted its own view of the evidence and decided that since *its* view is "based on evidence presented at the trial" and since

the jury's verdict is inconsistent with the court's view, the verdict will be set aside. This is an erroneous and unconstitutional misapplication of the "weight of the evidence" doctrine. As stated in *Schybinger* v. *Interlake Steamship Company,* supra, at p. 312:

> Neither the trial court nor the reviewing court can reweigh the evidence because the jury could have come to a different conclusion, or because the court believed a contrary verdict would be more reasonable.

It is beside the point that the trial court's view may be "supported by substantial evidence." It is the jury's view that matters and it is the jury's view that must be sustained where, as here, it is supported by the evidence.

B. *The Jury Verdict was not Against the Weight of the Evidence.*

Introduction

The court's review of the evidence was thus prefaced (App. 238-9):

> A review of the evidence reveals that the existence of the conspiracy is predicated in large part upon the various efforts on the part of the First Wisconsin defendants to somehow interfere with the financing for Juneau Square East. Without these overt acts, the conspiracy makes little sense in light of the fact that both Aetna and Marshall-Michigan *granted two extensions to the plaintiffs* in order to permit them to salvage the project. The theory is presumably that Marshall-Michigan *granted the extensions* with the knowledge that the First Wisconsin defendants would then interfere with any attempt to obtain the needed financing. (Emphasis added.)

The fact is no extensions were granted. Agreements were made by which Aetna and Marshall-Michigan granted air rights, but the plaintiffs took on deadlines. The time in which plaintiffs would lose their right to possession of

the project (if they failed to get the financing) was *shortened* by the agreements. (See, e.g., Sann at 10,144-10, 153.) The court in its decision on the directed verdict motions (App. 210), had *correctly* characterized these agreements as follows:

> Although Aetna claims that the settlement agreements were favorable to plaintiffs, the fact remains that in exchange Aetna obtained a waiver of plaintiffs' equitable defenses and redemption rights and a financing deadline after which it could enter a default judgment.

The stipulations tied the Juneau Square project into a neat package. Whether or not Aetna realized it was participating in a conspiracy to restrain trade (Aetna successfully argued it did not knowingly participate), the fact is the Juneau Square takeover was more simply and quickly accomplished with the stipulations than without them. The delay and unpredictability of litigation, the threat that discovery may uncover clandestine activity (such as the Shute/Shapiro contact) and the time of redemption allowed after foreclosure judgment if the equity court granted it, all meant that, from the conspirators' standpoint, the stipulations were a net plus.

The trial court should have prefaced its review of the evidence with: the documented intention of the First Wisconsin defendants to take over Juneau Square, the obvious fact that that objective would have been frustrated if plaintiffs had successfully completed *any* of their financing negotiations, the fact that the First Wisconsin is almost invariably found in contact with the financing sources of Juneau Square (the one exception being Diversified, where a commitment was issued,)* and the overall pat-

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* The diversified commitment expired because a stipulation deadline had passed.

tern of the defendants' business behavior. These considerations are discussed in the following portion of this brief.

1. *The pattern of business behavior of the defendants is evidence of the conspiracy.*

At the inception of the First Wisconsin Center development, the First Wisconsin defendants and NML coordinated their building development plans to eliminate competition between them, though each had resources and real estate to proceed independently and competitively to develop office space (8066, 8073). Such parallel and synchronized business activity is itself evidence First Wisconsin and NML were combining their plans to control the supply of space on the market. *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948); *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946). Add to this that these two financial and real estate giants were interlocked with 5 common directors. See Justice Brandeis quoted in *U.S.* v. *W.T. Grant Co.*, 345 U.S. 629, 636-7 (1953).

Add to this the documentary evidence these companies acted as one another's agents in assembling CBD real estate. (See p. 14 above). It is hardly likely there will be full and free competition between companies that are interlocked and act as one another's agents. In addition to all of this are the documents showing NML's building would be delayed 5 years, plainly accommodating the First Wisconsin Center's leasing up time, and confirming agreement that NML's "interim space needs" would be accommodated by the First Wisconsin Center (PX 497 and 544).

This body of evidence was sufficient to establish that from the very inception of their First Wisconsin Center development the First Wisconsin companies were conspir-

ing with NML to control the supply of office space on the market. *C-O Two Fire Equip. Co.* v. *United States,* 197 F.2d 489 (9 Cir. 1952), cert. den. 344 U.S. 892. This being established, two further rules are applicable: First, only a minimal level of additional evidence is required to connect additional individuals to the conspiracy. *Taxi Weekly, Inc.* v. *Metropolitan Taxicab Board of Trade, Inc.,* 539 F.2d 907, 915 (2 Cir. 1976). Second, once a conspiracy is established it is presumed to continue until the contrary is proved. *United States* v. *Mayes,* 512 F.2d 637, 642-3 (6 Cir. 1975).

A second consideration is the chain of circumstances of the Shute/Shapiro memorandum and contact with Aetna. These establish the First Wisconsin's *intention to acquire the entire Juneau Square block* and the *clandestine modus operandi* of the defendants, *specifically targeted at financing* and expressly contemplating *a takeover "strategy"* predicated *on economic coercion.* Included in this evidence is the documented, deliberate, specific intention to interfere with *Juneau Square's sources of financing.* This in itself is probative evidence that such interference took place. I Wigmore, Evidence, §102, p. 534; *Baughman* v. *Cooper-Jarrett, Inc.,* 391 F. Supp. 671 (D.C.W.D.Pa. 1975). Evidence of modus operandi is ". . . highly relevant to the basic question of whether [the defendants] committed the alleged offense." *United States* v. *Grzywacz,* 603 F.2d 688 (7 Cir. 1979). The court ignored First Wisconsin's documented modus operandi.

Consideration of First Wisconsin's motivation to interfere with financing and to take over Juneau Square is indispensable. Holscher himself admitted the evident fact that if the Juneau Square developers had obtained their financing for East, the First Wisconsin would never have been able to take over Juneau Square (7741). Motivation is one of the three classic categories of conspiracy

evidence, as discussed in *Overseas Motor, Inc.* v. *Import Motors Ltd., Inc.* (denying liability on grounds not material here) 375 F.Supp. 499, 532 (D.C.Mich. 1974), wherein the court suggested a useful approach to conspiracy by examination of the ". . . several dimensions along which the evidence can profitably be analyzed. These may be characterized as motive, opportunity and consistency of overt acts."

This highlights an important inconsistency in the trial court's decision. The first two-thirds of the decision, in effect, sustains the sufficiency of evidence and demonstrates ample ground not only for the denial of judgment n.o.v. but also for sustaining the jury verdict. Yet, when the court embarks upon the weighing of the evidence on interference with financing, it fails to consider that much of what it has found favorable to plaintiffs *constitutes evidence precisely on interference with financing.*

A notable example was defendants' inability to produce a credible motive for the takeover that was not anti-competitive. The defendants contended their sole motivation was for the future expansion needs of the bank. They admittedly had no specific expansion plans (8454, 8463). Kasten admitted they could expand in the remaining half of their own building (8457) and in their two additional blocks to the south and southeast (8457-8). Their published reports were to the effect the First Wisconsin Center alone could handle the expansion needs for the "foreseeable future" (8466; PX 573, 567). Kasten could not even identify the *century* when future expansion into Juneau Square might occur (8455). It was with good reason the court found the following in respect to the First Wisconsin's motivation:

> While there is evidence that the First Wisconsin defendants merely desired the property for future ex-

> pansion purposes, the surrounding circumstances and activities of the various conspirators indicate another possible motivation. The jury was aware of the fact that Juneau Square East was in a position to assert competitive pressure on the new First Wisconsin Center. The evidence indicated that the only real competition in the area for "first class" office space consisted of the MGIC Plaza and the First Federal Plaza. The size and location of Juneau Square East would have undoubtedly altered this situation (App. 234).
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> * * * * *
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> The jury was asked to believe that these extensive maneuverings were motivated by some unknown expansion need in the distant future. In rejecting this view of the evidence, the jury obviously weighed the circumstantial nature of much of the evidence proffered by the plaintiffs and found it to be more persuasive than the explanations of the First Wisconsin defendants. The apparent inconsistencies in the testimony of certain witnesses probably played a key role in this decision (App. 235).

Thus, the jury was justified in finding that the First Wisconsin companies' motive for the Juneau Square takeover was to restrain competition.

Another important consideration is that, except for Diversified, there was contact between the First Wisconsin and each of Juneau Square's financing sources: Aetna, Metropolitan, Marshall-Michigan (see discussion below), New York Life, Baird & Warner and Northwestern Elevator Co. Add to this the repeated references to Juneau Square financing in First Wisconsin conferences and documents generated during the course of the conspiracy. Why should Shute be telling Shapiro about Juneau Square Corp.'s application to Aetna for financing (PX 304, S.App. 387)? Why should Liek be discussing Juneau Square's

Metropolitan financing with Holscher (7588-9)? Why should Holscher be reporting to Kasten and Kuehl on Juneau Square's sources of financing (PX 469)? Why should Dickens of the bank be reporting to Holscher on the results of his interview with Moertl following New York Life's declination of financing for Juneau Square (PX 466)? Why should Foley & Lardner lawyers be reporting to Holscher what financing has been lined up for Juneau Square (PX 468)? With this continuing interest in the Juneau Square financing on the part of the defendants and their invariable contact with Juneau Square's financing sources, there was ample evidence of *opportunity.*

Another preliminary consideration: the defendants repeatedly demonstrated a disregard for fairness and legality. Besides the Shute/Shapiro "strategy," this is shown in Holscher's misuse of the plaintiffs' confidential credit files;* the unauthorized letter sent by Marshall-Michigan to the tenants of Juneau Square, telling them not to pay their rent to Juneau Square Corp.; the manipulation and abuse of the mortgage foreclosure process; the slanderous

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* It is difficult to understand the meaning of the court's footnote at App. 228 (fn. 10). Obviously plaintiffs do not contend the normal use of credit information by members of the bank's credit department is illegal. Here, however, the credit officer confirmed the confidential files should not have been available to Holscher (7471-5, 7723). The evidence is undisputed there was extensive confidential information contained in the files (e.g., 1065, 1072-3). No one claims Holscher had any credit function, yet he routinely utilized the files in the course of his program to take over Juneau Square (7550-5, 7580-2, 7850-7, PX 304 and PX 385). This misuse was plainly illegal as shown by the cases cited by the trial court in its footnote 10, App. 228, and in the authorities cited with our requested instructions, App. 334-335.

credit report to New York Life, containing an accusation the trial judge recognized was fabricated (App. 239); the secret agreement among the First Wisconsin companies and Marshall-Michigan to commit a fraud upon the court by circumventing a possible injunction; the extortionary demands upon an attorney to sell out his clients' interests in exchange for release of personal liability on a note; the secret agreements to maintain artificial judgments on the books against the plaintiffs; the splitting and selling of judgments to enhance economic leverage over the plaintiffs. The illegality of each of these acts were briefed as part of plaintiffs' requested instructions (see App. 330-343A). Their predatory nature is obvious. These overt acts of the defendants, particularly when taken together with their pattern of restraining trade from the inception of the First Wisconsin Center and their obvious motivation and opportunity to destroy competition from Juneau Square constitute a pattern of business behavior establishing conspiracy. *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969).

In summary, the defendants do not arrive at the evidence on financing with an otherwise clean slate. Their behavior, motivation, modus operandi and crystallized intention constitute strong evidence of a conspiracy to restrain trade which included as a specific, selected, primary means the interference with financing of Juneau Square.

2. *The transactions which were targets of the conspiracy.*

Evaluation of the court's analysis (App. 239-40) is aided because the court states what it felt was "significant."

The court states, "The only loan transactions which are in any way linked to the First Wisconsin defendants are those involving Metropolitan and New York Life"

(App. 239, para. 2). In fact there were at least seven financing arrangements which the jury could find were interfered with directly or indirectly by the defendants and their co-conspirators and were lost as a result of the conspiracy: Aetna, Metropolitan, Marshall-Michigan (the trial court completely overlooked this interference with the Juneau Square project and its financing, which alone would warrant reinstatement of the verdict, as will be shown), Diversified, New York Life, Baird & Warner REIT and Northwestern Elevator Company.

Aetna is discussed more fully below at p. 04 104, seq. However, we point out here the jury was entitled to find Shapiro followed his instructions to contact Aetna "March 10 or so," causing the declination by Aetna of March 11, 1969, even though it found Aetna was not in conscious conspiracy with First Wisconsin and Marshall-Michigan. Clear proof of specific intention to do an act, as shown beyond doubt in the Shute/Shapiro memo (PX 304, S.App. 386-390) and the other evidence discussed above, constitutes proof that the act was done pursuant to the intention. I Wigmore, *Evidence* §102; *Baughman* v. *Cooper-Jarrett, Inc.*, supra.

The following analysis follows the sequence in the court's opinion (App. 239 et seq.).

3. *Who called whom?*

The court found (App. 239), "It is significant that in both instances [Metropolitan and New York Life], the contact was initiated by the prospective lender and not the First Wisconsin defendants." (App. 239)

Liek of the First Wisconsin was the only one who testified on who initiated the Metropolitan contact. Liek was impeached as to his knowledge of First Wisconsin's desire to obtain Juneau Square and as to his knowledge that

Metropolitan turned down the loan. The jury was plainly entitled to follow the trial court's instruction (*falsus in uno*—13,946), and give his testimony no weight, much less "significant" weight.

As to New York Life, the court again relies solely on oral claims: by co-conspirator Duncan of NYL and by Little of the First Wisconsin. Even in the absence of other evidence, a jury would be entitled to attach no significance to their claims that Duncan placed the first call. But there is other evidence: PX 554 (S.App. 529), a letter of May 4 (the day before the first NYL meeting) from Bradley of Foley & Lardner to Holscher of the First Wisconsin, forwarding a May 3 summary of the then current situation on Juneau Square prepared by Marshall-Michigan's lawyer Huber, which was forwarded to Kasten and Little on May 6, 1971. Little's only connection with Juneau Square at this time was his credit report to NYL. This activity was under way *before* the May 5 meeting at which Duncan suggested he do more "credit checking." That these five people came together at this time and in these circumstances, in a sequence which brackets the May 5 meeting at NYL, squares only with a conspiratorial theory of the slanderous credit report. This evidence has never been answered by the defendants.

In the face of the jury verdict, it was error and an abuse of discretion to accord "significant" weight to this testimony of Liek, Little and Duncan.

4. *Indication of pressure.*

The trial court next states, "It is also significant that no witness from either Metropolitan or NYL gave *any* (sic) indication that they were pressured by the First Wisconsin defendants to decline plaintiffs' loan application" (App. 239). There is no requirement for such an

admission. The evident hostility of the witnesses from Metropolitan and NYL makes it unlikely they would admit the truth in that respect. The court's comment is itself significant—indicating that it failed to realize the difficulty of extracting the truth in conspiracy cases, where ". . . the proof is largely in the hands of the alleged conspirators and hostile witnesses thicken the plot." *Poller* v. *Columbia Broadcasting System, Inc.*, 396 U.S. 464, 473 (1962). The Metropolitan and NYL witnesses used every means to avoid pinning blame on the defendants and when necessary took refuge in a claimed lack of memory (e.g., 6761-5, 6774-5, 6862-6, 6992-5). For the most part, it was the contemporaneous documents rather than the witnesses that were the source of believable evidence (e.g., 6992, 6996-7, 7007-7019, 7189-93).

The hostility of NYL was demonstrated by: (a) the numerous conferences between Beckwith of Foley & Lardner and the NYL witnesses (e.g., 6777-84, 6970-1, 11,076); (b) the fact that Foley & Lardner were Milwaukee counsel for NYL (PX 422); (c) the fact that two NYL witnesses came voluntarily from New York to Milwaukee to offer contrived testimony on behalf of the defendants (see Boone when impeached at 10,977-80, 10,981-7 and 10,991-9, and Rose at 11,100-9); (d) the fact that throughout their depositions they agreed to every suggestion included in the leading questions put by defense counsel (e.g., 6801-11; 6868-77, 7021-2, 7048 et seq.). The court required, in effect, that plaintiffs have the cooperation of these witnesses. This violates the common sense doctrine that in conspiracy cases a plaintiff must rely on inferences developed from inconsistencies between witnesses and similar methods of proof, precisely because the proof is in the hands of hostile witnesses. *Poller* v. *Columbia Broadcasting System, Inc.*, supra.

5. *Metropolitan.*

The court next quickly dismisses the Metropolitan declination, assuming the Liek contact had no effect on Metropolitan, that nothing Liek said was inaccurate and the supposed existence of substantial business reasons for the declination (App. 239). The court overlooked the context in which this declination occurred and apparently forgot an important item of evidence relating specifically to Liek. With the pre-existing intent to takeover Juneau Square by clandestine means established by the Shute/Shapiro memo (PX 304), the clear motive to prevent successful financing negotiations, and the pattern of defendants' activity and modus operandi detailed above, a mere showing of contact (opportunity) should suffice to establish interference. The evidence showed more: the plaintiffs had substantially completed the financing negotiation and on one portion of the package already had agreement (the General Electric Pension Trust sale and leaseback). Liek and Metropolitan were in contact, after which the deal abruptly fell through. Plaintiffs pressed Metropolitan for an explanation and could not get one. The broker on the negotiation felt that Metropolitan's boilerplate explanation finally sent to him was a sham. Liek denied knowledge of the First Wisconsin's goal of acquiring Juneau Square but was impeached by documentary proof that he attended the First Wisconsin board meeting where the acquisition was formally approved.*

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* The court expressed "some doubt as to whether Liek was present" (App. 229) because of oral testimony by the bank officials of their practice of keeping people like Liek out of the room except for matters on which they are to make a specific presentation. The jury having found for the plaintiffs, the trial court was completely unjustified in accepting that attempt to explain away the *documentation* of Liek's presence. It is axiomatic the jury could take at face value the document itself, which records Holscher and Liek as being "present." (PX 458, App. 475)

The court overlooked a second impeachment of Liek's testimony, on a matter which, beyond mere impeachment, bears on the substantive issue of whether Liek had a hand in the Metropolitan turndown. At his December 15, 1972 deposition, Liek testified (5042):

> Q. Are you aware of the fact that Metropolitan Life Insurance Company ended up declining to provide financing for Juneau Square?
> A. I am not aware of it.

Holscher, however, testified at the trial (7588-9):

> Q. Actually, Mr. Holscher, Mr. Liek had been in communication with you relative to Juneau Square prior to this date [November 19, 1969]; had he not?
> A. I believe I asked Mr. Liek prior to my presentation what he had heard about the present status of that project, and I think he reported to me that he had heard that Metropolitan had turned down the loan.
> Q. What was Mr. Liek's function in the bank?
> A. At that time he was vice-president in charge of mortgage loans division.
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> * * * * *
>
> Q. And he is the one that was in communication with Metropolitan in early November, 1969, wasn't he?
> A. I don't know. All I know is I asked him and he reported to me that he had heard that Metropolitan had turned the loan down, and I was doing my checking prior to bringing it into the Executive Committee.

The jury could justifiably have found that Liek knew of the First Wisconsin's plan to acquire Juneau Square, and that knowing of the turndown at that time he probably had a hand in it.

As to the explanation for the turndown given by Metropolitan, the jury had before it the broker's reaction that it was a sham and that when the plaintiffs first sought an

explanation after the turndown they were given none. The jury was also aware that in a later financing sequence (New York Life) similar, superficial explanations appeared, contradicted in that case by documents showing the First Wisconsin's slanderous credit report as the real reason (see p. 71-73 below).

The court in effect required direct proof as a condition precedent to any finding of interference with the Metropolitan financing, preventing plaintiffs from relying upon circumstantial evidence. This violated the consistent judicial recognition that circumstantial evidence is the rule and direct evidence the exception in conspiracy cases. *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208 (1939); *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U.S. 464 (1962). As stated in Sullivan, *Antitrust* (1977) at 312:

> . . . since the concept presupposes covert action, we must not expect direct evidence of the offense to be easily accessible; inference from circumstances will often have to do.

Viewing the evidence as a whole, the jury was justified in finding that the First Wisconsin interfered with the Metropolitan financing.

6. *The Marshall-Michigan sequence and the foreclosure actions.*

The trial court confirmed the plaintiffs' view of what Marshall-Michigan did (App. 231-2 and 235) but completely ignored it in weighing the evidence on interference with the Juneau Square project and its financing.

Marshall-Michigan, previously cooperative with plaintiffs, joined the conspiracy when its officials came from New York to Milwaukee, intending to cure the tax default and thus terminate the Aetna foreclosure (PX 330B, 5310-

11). Had they done so the Aetna foreclosure action would have ended (the only default was in payment of real estate taxes), and the plaintiffs would have had at least the passive if not active cooperation of Marshall-Michigan to complete the project, as Boerema (of Marshall-Michigan) said was its plan. Instead, through the offices of Foley & Lardner they were introduced to Holscher and joined the conspiracy.

Thus, the jury was entitled to find that as a result of the conspiracy (1) the $245,000 payment was not made to cure the tax default (and the Aetna mortgage thus not reinstated and its foreclosure action not terminated); (2) Foley & Lardner on behalf of Marshall-Michigan sent the unauthorized letter to the Juneau Square tenants directing them to discontinue rent payments to the plaintiffs (thereby disrupting the badly needed cash flow and injuring plaintiffs public image and credibility); (3) Marshall-Michigan entered into its secret agreement with Aetna (PX 318A and B, S.App. 395) giving it precedence in its own mortgage foreclosure action, which it then commenced.

Marshall-Michigan's proposed payment of the $245,000 tax default *was itself a form of financing with which the conspiracy interfered.* In addition *its hostile acts obviously impaired the plaintiffs' ability to obtain other financing.* The court plainly overlooked that the maintenance of *both* foreclosure actions can be attributed to the conspiracy since without it the Aetna mortgage default would have been cured and the Marshall-Michigan foreclosure action would never have been commenced. *Nor was this solely a matter of frustrating the plaintiffs' ability to obtain financing. These actions were a direct restraint upon the project and have a self-evident bearing upon the plaintiffs' loss of the project to the First Wisconsin defendants.*

This evidence alone justified the jury verdict.

7. *Diversified.*

The plaintiffs pursued financing through Cooper-Horwitz, a large New York based brokerage firm which apparently had made contact with New York Life. That negotiation broke off abruptly, and Holscher of the First Wisconsin had unexplained knowledge of the fact that the plaintiffs had sought that financing (PX 469). Subsequently, the plaintiffs obtained a commitment from Diversified Financial Corporation of America, Inc. (PX 181A). This is the one financing in which no evidence of a contact from the First Wisconsin was discovered. Unfortunately, the deadline provided in the foreclosure action stipulation had passed and Aetna would not extend it. Had the Aetna foreclosure been terminated by the curing of the tax default, which is to say, had Marshall-Michigan not joined the conspiracy, that problem would not have existed. The jury was entitled to find that but for the conspiracy—and the two foreclosure actions—the plaintiffs would have been able to complete the project with the Diversified financing.

8. *New York Life Insurance Company.*

In this instance there was direct evidence of the First Wisconsin companies' interference with financing—a documented credit report from the First Wisconsin National Bank of Milwaukee containing an accusation the trial court concedes was fabricated, and the testimony of the New York Life loan committee chairman (with a confirming contemporaneous memorandum) that the loan was declined because of the false accusation. In addition there was abundant circumstantial and confirming evidence. Instead of respecting the jury's determination based on that evidence, the court made its own findings based upon an uncritical acceptance of certain testimony offered by witnesses willing to say whatever the First Wisconsin defen-

dants suggested to them and upon a series of specious rationalizations advanced by the defendants.

The court adopted a very specific seven point analysis of the evidence surrounding the loss of the New York Life financing (App. 239). In order to give a fair summary so it can be determined whether the *jury's* view of the case is supported by the weight of the evidence, the court's list must be corrected and expanded. We quote the court's list here in italics, with the necessary corrections and additions in *regular type*:

> *This leaves the circumstances surrounding the Little contact as the most significant and the most damaging evidence of the existence of a conspiracy. Those circumstances indicate that: (1) the loan application was forwarded to the home office of New York Life with a favorable recommendation;*

The favorable credit report made before the first NYL committee meeting began, "We have *completed* the (credit) checking. . . ." (PX 402). The trial court overlooked the obvious inference that the subsequent "credit checking" by Duncan was beyond the normal course of business, particularly since the credit checking was "completed" after great time and expense by NYL and the Juneau Square developers and extensive investigation of the project and its sponsors. The court also forgot that by this time the activity among Bradley, Holscher, Huber, Kasten and Little (PX 554, S.App. 529) (see next page) had already begun.

> *(2) The matter came before the loan committee on May 5, 1971 but was withdrawn to permit further investigation into the financial strength of the participating bank;*

An important difference exists between this statement and Duncan's actual testimony. Duncan was aware of the First Wisconsin Center development and was admittedly

a friend of Kasten and the First Wisconsin (6975-80, 8369, 8557-8). Duncan testified *he* raised the question of Midland's bank's strength (7052, 7057) and that *he* asked permission to do another credit check (7061) as long as the loan application was being withdrawn for renegotiation on other points. The court also forgot that those proposed changes were successfully renegotiated with the Midland Bank and the Juneau Square developers by New York Life's field representative, who upon completion of the renegotiation told the Juneau Square developers they "had a deal" and that it was "all set" (1752-4).

(*3*) *Duncan then contacted Albert Little of the First Wisconsin for a credit check;*

As discussed earlier (p. 57), whether Duncan contacted First Wisconsin rather than vice versa depends entirely upon the credibility of Duncan and Little of the First Wisconsin. The trial court admittedly treated as a "significant" fact its assumption the contact was initiated by Duncan. Even if true, that would not necessarily weigh against the conspiracy, but would show at least an opportunity for the First Wisconsin and its co-conspirators to effectuate and prevent frustration of the acquisition plan the First Wisconsin had settled upon two years before. Documentation (PX 554) indicates strongly, however, the First Wisconsin-NYL sequence had begun *before* the May 5 meeting: PX 554 includes a May 3 workup by Marshall-Michigan's lawyer, Huber, forwarded by Bradley on May 4 to Holscher, who in turn forwarded it on May 6 to Kasten and Little. This document has no explanation other than activity connected with the NYL credit report. The timing of these communications and the five persons involved fit the conspiracy like a key in a lock. It is undisputed Little had no connection whatever with Juneau Square at this time, except for his "credit" report to NYL. Each of the others played an important

role in the conspiracy. Their combined involvement at this time and under these circumstances is strong evidence of conspiracy. See Sullivan, *Antitrust*, §109 at p. 315. Since this activity began before the May 5 meeting and clearly led to the credit report, and since NYL's documentation shows that its normal credit checking had been completed before the May 5 meeting, the jury was entitled to infer that the First Wisconsin officials, through their friend Duncan, initiated the so-called credit checking that elicited the slanderous report and destroyed the loan.

(4) Little responded a few days later with a telephone call to Davey;

Consider the implication of what the court has just pointed out. Later in the court's opinion (App. 239, col. 2) "significant" weight is given to a specious defense contention that Little did not really know what he was talking about when he made the report, and therefore intended no harm. *There was a time interval* between Duncan's telephone conversation with Little and Little's call to NYL giving the credit report. That indicates the report was not an off-hand comment as Little tried to characterize it, to create the impression he may have made an inadvertent error. Huber, Bradley, Holscher, Kasten and Little were experienced professionals whose methods as revealed in this case were characterized by sophistication and attention to detail. The latter three at least had full access to the credit files. They took time before sending the report. They were surely not unmindful of the importance to First Wisconsin that Juneau Square *not* succeed in obtaining the loan. With the established background of the First Wisconsin's take-over objective and modus operandi and the specific evidence of activity among Huber, Bradley, Holscher and Kasten leading to a credit report containing a charge the trial court concedes was fabricated, the jury

had ample reason to find that the Little report was a deliberate overt act in furtherance of the conspiracy.*

In contrast to its slanderous report to NYL, there had been numerous credit reports, all favorable, given by the bank prior to its decision to take over Juneau Square (PX 317A and B, 640 and 641; 10,551-65).** All such reports were noted in the bank's credit files on Juneau Square Corp. and Wil-Ten (PX 640, 641). *After* the bank's decision to take over Juneau Square *none* of its credit communications were recorded (PX 640, 641; 10,556-7). The jury could thus conclude the makers of these later reports, such as *Liek to Metropolitan* and *Little to NYL*, did not want known the fact that they were made or their contents.

> *(5) Davey made contemporaneous notes of the conversation in the form of a memorandum which was forwarded to all of the members of the committee;*
>
> *(6) The committee met again on May 19, 1971 and the loan application was rejected by a vote of 5-1;*

The court inferred (App. 240), "If the credit report was as devastating as suggested by the plaintiffs, it is logical to presume that the vote would have been unanimous." This inference is vitiated by the record as to the lone dissenter, Robert E. Conklin. Notes in the NYL committee records themselves showed that when the Little report was read to the committee, "[Robert E. Conklin] had a copy & told William C.

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* Nor was the jury required to take seriously another specious "issue" raised by the defense and apparently given weight by the court: did Davey accurately *record* Little's report in PX 404, S.App. 452. Obviously the jury was entitled to take the contemporaneous document at face value and to regard First Wisconsin's attempts to deny it, justify it and explain it away as factors *assailing*, not supporting, the view adopted by the court.

** The alleged diversion of funds supposedly occurred before all of these favorable reports.

Lutz he normally does not take action on such checkings." (PX 419, 10,986-7, 11,101-2). On PX 383 (App. 445) the memorandum of committee chairman Lutz's conference call just after the declination, which lists the alleged mishandling of funds as the number one reason for declining the loan, Conklin "indicated he is not getting involved." Thus there is no inference from Conklin's vote requiring the jury to reject the documentation that the loan was lost because of the Little credit report.

Further, the report on its face is "devastating." It not only paints the Midland Bank in an extremely bad light, but it accuses the borrowers of diverting funds.* The jury was entitled to use its common sense in considering how officers of an institutional lender, meeting in New York City to consider a $14 million loan to a Milwaukee project, would react to a credit report coming through its company treasurer to the effect the prospective borrowers had diverted construction funds earlier loaned on the same project. It is self-evident the impact of such a report would be to kill the loan.

(7) The principal reason for the declination as testified to by members of the committee and as documented by the contemporaneous minutes of the meeting was that the participating bank was found to be unqualified.

This conclusion, repeated by the trial court at App. 240 ("the overwhelming evidence indicated that the concern of the committee was the Midland bank") is completely unsupportable. It was indeed the version the NYL and First Wisconsin witnesses attempted to establish but their testimony was in deep conflict and severely impeached. For example, Rose of NYL testified:

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* The First Wisconsin attempted numerous explanations for the Little accusations. Each attempt in turn was demonstrated as a falsehood. The trial court found the Little accusation was fabricated (App. 239). It was therefore a slander.

Q. Was there any discussion at the May 19 meeting that Juneau Square developers had mishandled construction funds previously in the Juneau Square development?

A. No, sir.

PX 383 (S.App. 445) shows that committee chairman Lutz listed as the *first reason* for declining the loan:

> "1. Sponsors [Juneau Square Corp., Moertl and Spoden] had mishandled funds and were being foreclosed."

Lutz further expressly testified that *this came from the Little credit report* (7191-7193, S.App. 446-8).

The mere fact there was conflict in this evidence means it was a proper jury issue. Moreover, it is the plaintiffs' view of the likely fatal impact of the report on the loan that squares with common sense. It is undisputed the committee chairman Lutz received the report in time for the meeting (PX 413, S.App. 456). Duncan himself, upon being pressed, admitted it was referred to at the meeting (6994-5), as the notations on the "committee brief" at the meeting confirm (PX 419 S.App. 468; 10,986-987).

The trial court also overlooked this: even if the loan refusal was predicated on the Midland bank's alleged lack of qualifications, that allegation too came from Little of the First Wisconsin.*

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* One must admire the subtlety of the hatchet job done on the Midland Bank and its president in the Little credit report to NYL. The president is described as "a very aggressive banker who is not well liked in the local financial community" (PX 404, 413). He is also colored as disloyal: "He led a proxy fight for control of the Marine Bank against those who had employed him." The faint praise of "reasonable progress" in the growth of the bank is followed by the suggestion it was only because of a merger rather than good business. The juxtaposition of these remarks provides a message no sophisticated lender could miss: it should not risk $14 million on people like that. Even if that were the only message in the report, the sender would hardly have to add that, besides, the developers had diverted construction funds on the project.

The court seems to have relied on the pro forma committee minutes and the testimony of two NYL officials who relied on those same minutes, plus handwritten notes which they "used to refresh their recollection" (PX 388, S.App. 499). The handwritten notes, it turned out, were made during a private conference with a Foley & Lardner lawyer (then the First Wisconsin's counsel of record) in preparation for depositions in this case (6876-7, 10,991 and 11,108).

The pro forma "minutes" were contradicted by the contemporaneous memorandum of Lutz and his testimony, cited above, that the real reason was Little's report that the Juneau Square developers had mishandled construction funds. This would warn a reasonable jury and should have warned the trial court that one need not accept at face value the pro forma minutes and boilerplate explanations put forth by lenders in this case as to why Juneau Square loans were declined. The broker on the Metropolitan loan (Stringer) knew that perfectly well, and so testified. The jury was entitled to conclude that Metropolitan's excuses in 1969, like NYL's "minutes" in 1971, were a sham. Neither the jury nor the court was required ". . . to view the evidence in this case with naivete," to disregard the ". . . ingenuity and subtlety of sophisticated businessmen. . ." or to be oblivious to the existence of a conspiracy ". . . which purposely leaves few tracks or fingerprints. . . ." *United States* v. *Consolidated Packaging Corp.*, 575 F.2d 117, 126 (7 Cir. 1978).

Another document bears directly on the causal relationship between Little's report and the NYL refusal to loan. PX 408 (App. 453), the memorandum sent by NYL committee chairman Lutz to NYL treasurer Duncan after he learned the First Wisconsin might have been Duncan's source, chastizes him for having used the First Wisconsin as a credit source:

> I do not know whether First Wisconsin Bank was one of your sources of information but if it was, I must tell you that I consider that bank, because of its own plans for building across the street, as hardly falling in the category of a disinterested source of information—rather, I would consider them as having a definite conflict of interest in reporting on their competitor's efforts in building a structure across the street from their proposed building that will come on the leasing market at least a year or more ahead of their building.

This memorandum would never have been sent had the credit report not played a role in the declination.

Moreover, Mr. Moertl would not have been required to verify and have others verify his integrity to Baird & Warner as described in the statement of facts, supra at 30-31, had it not been put in issue by the credit report (the only known attack on the integrity of the Juneau Square developers) and been a substantial factor in causing NYL to refuse the loan.

Another important fact: After the loan was declined, NYL suggested it might be revived *if Moertl and Spoden were removed from the project.* PX 383 (S.App. 445) reflects a conversation between NYL and a Midland bank official (Barian), in which Barian, in attempting to revive the deal, "told Spoden and Moertl that they either got out or the [Midland] 'bank' would [get out] and thereby kill the deal." Moertl testified that they tried unsuccessfully to get a substitute developer, to remove the stigma on the project arising from the bad credit report (1952, 3224). Obviously, this would not have been necessary had the credit report played no role in the NYL declination.

The contemporaneous understanding of the parties is demonstrated by the memorandum of Dickens, a First Wisconsin credit officer who apparently was not privy to the actions of Huber, Bradley, Holscher, Kasten and Little.

Following the furor caused by the loss of the New York Life loan, Moertl received a telephone call from Dickens urgently requesting a luncheon conference (2040-2). Dickens pumped Moertl for what he knew about the New York Life declination, and then reported to Kasten and Holscher as follows (PX 466, S.App. 480):

> Takedown of the proposed $12 million mortgage loan from New York Life for unit #3 of the Juneau Square complex appeared a certainty until certain derogatory information regarding the principals became known to the company's loan committee. The origin of the negative information is not known but Moertl feels our bank or Foley & Lardner could be responsible. To the best of my knowledge we have not been contacted by New York Life.

We now know, as did the jury, that there *was* contact between Little of the First Wisconsin and New York Life. Indeed, the First Wisconsin may *not* have been contacted *by* NYL, as Dickens says. It is more likely First Wisconsin initially contacted Duncan. But the fact of the contact is documented. The fact of the slanderous credit report resulting from that contact is documented. The fact of concerted activity among Huber, Bradley, Holscher, Kasten and Little at that very time is documented. The fact that that credit report resulted in the loss of the New York loan is documented and confirmed in testimony by the chairman of the loan committee. The high recommendation given this project (PX 410, S.App. 455) before the fatal credit report is documented, and the actions of the parties surrounding and following the May 19 meeting of the New York Life loan committee confirm why that highly recommended loan was declined: because of "certain derogatory information [known by the First Wisconsin to be false] regarding the principals was [made] known to [NYL's] loan committee" (PX 466, S.App. 480).

The New York Life episode was correctly viewed by the jury. The trial court's conclusions about the source, intent and impact of the false report on this financing were utterly wrong.

9. *Baird & Warner REIT.*

The trial court's weighing of the evidence erroneously ends with the New York Life financing. There was much evidence on later interference by the defendants, the next principal source being the Baird & Warner REIT (see p. 31 above).

By December 1971 the Juneau Square developers had a tentative commitment for an equity investment from the Baird & Warner REIT (PX 241, S.App. 377), as part of a financing package which Baird & Warner was willing to sponsor to complete Juneau Square East. When it became obvious the Christmas holidays would prevent completing the financing before the January 2, 1972 deadline provided in the foreclosure stipulation, Baird & Warner solicited and thought it obtained agreement from Marshall-Michigan and Aetna for additional time to complete the package (PX 677, 12,698-12,705). Marshall-Michigan instead reneged and entered judgment on the first business day of 1972, precipitating entry of judgment by Aetna (2021-24). Holscher of the First Wisconsin was in contact with Marshall-Michigan's New York spokesman in late December 1971 (7766). A Baird & Warner official handling the negotiations testified that as a result of the entry of the judgments, "We decided not to work further" (12,710); S.App. 378.

The defendants' overall business behavior, modus operandi, motivation and the history of contacts and cooperation between the First Wisconsin defendants and Marshall-Michigan, coupled with the evidence just summarized, permitted the jury to find the conspiracy destroyed the

Baird & Warner REIT financing. The trial court gave no reason for ignoring this evidence.

G. *Northwestern Elevator Co.*

Following the loss of the existing project by the foreclosures (see S.App. 616), the plaintiffs tried to develop a reduced version of Juneau Square East in the northeast quadrant of the block. Financing from usual sources was now out of the question because of the $5 million Aetna judgment and the $1 million Marshall-Michigan judgment against Juneau Square Corporation.

It is not subject to dispute that the First Wisconsin Corporation arranged for the Aetna judgment to remain artificially of record (see p. 33 above and PX 330, 330A, S.App. 424, 440). There was no basis on which the court could disregard it. It was a direct and obvious restraint on the project and interference with the plaintiffs' ability to obtain financing. A similar arrangement was made in the contract of sale between the defendants Marshall-Michigan and Marshall-Wisconsin (the First Wisconsin Corporation subsidiary created to acquire Juneau Square). Under the contract Marshall-Wisconsin obtained one-half Marshall-Michigan's so-called deficiency judgment against Juneau Square Corp., Marshall-Wisconsin's one-half to be the prior lien against Juneau Square Corp.'s property (PX 326 and 324, S.App. 422 and 412-3). The plain purpose of this was economic coercion of the plaintiffs. Even though the text of the agreement (PX 324) suggested there were no side agreements (p. 8, para. 7 and p. 14, para. 16; S.App. 407 and 413), there *was* a side agreement to convert the sale of assets to a sale of stock if needed to circumvent a court injunction (PX 329, S.App. 423). The existence and purpose of these agreements is not subject to reasonable dispute. It was plain error for the court to disregard them in its weighing of the evidence.

The same is true of the First Wisconsin's buying up the second mortgage on one of the northeast quadrant parcels, from Northwestern Elevator Co., Juneau Square Corp.'s last remaining source of financing. First Wisconsin had already bought the first mortgage on the parcel. Holscher admits Northwestern Elevator had been advancing funds to keep the first mortgage current. Holscher bought up the second mortgage in late 1972, (7803). Marshall-Wisconsin then foreclosed.

Similarly, the Menos family had been permitting the Juneau Square developers to delay payment during the early 70's and had rejected bids by First Wisconsin emissaries to sell out to them. When the existing project was substantially lost in the spring of 1972, Holscher persuaded Menos to sell for a substantial premium over the outstanding balance on the mortgage note, even though the note was in default. The trial court should have considered the implications of acquiring ownership by buying up and foreclosing mortgages. (See briefing accompanying plaintiffs' requested instruction at S.App. 337-8.) It was fully in keeping with the predatory tactics consistently used from the inception of the conspiracy in 1969 through this final extinction of the Juneau Square project.

A recapitulation of certain salient facts shows the justness and common sense in the jury's verdict.

1. In March 1969 the First Wisconsin defendants set the objective and strategy to take over the entire block where the plaintiffs were developing their Juneau Square project. This objective was never revised or abandoned.

2. Over the next three years the plaintiffs made many attempts to finance the construction of Juneau Square East, without which their project could not succeed,

against ever increasing obstacles, especially after Marshall-Michigan fell in with the First Wisconsin companies' plan.

3. If any one of the plaintiffs' financing efforts had succeeded Juneau Square East would have come on the market first, in strong competition with the planned First Wisconsin Center, and the defendants' objective would have been frustrated.

4. At the scene of every failed financing effort the tracks of one or more of the defendants are found, in many cases unmistakable and documented, despite denials and attempted coverups.

5. The jury had direct evidence of defendants' interference with financing and other restraints upon the project in respect to the events bringing Marshall-Michigan into the conspiracy and the New York Life, Baird & Warner REIT and Northwestern Elevator Co. financing arrangements. Strong circumstantial evidence existed as to the interference with financing from the other sources, including documentation of the motivation, specific intent, modus operandi, clear opportunity and the overall pattern of business behavior.

6. The First Wisconsin achieved its take-over objective in the spring of 1972 with the aid of Marshall-Michigan and others. It was now able to set record high rental rates for its new Center without fear of competition from its partner, NML, or its victim, Juneau Square. There would be ". . . no [other] first class office space available east of the river." (PX 499, S.App. 493.)

The jury's findings in the first trial were fully supported by the evidence. A fair weighing of *all* the evidence leads to only one conclusion: justice miscarried when this verdict was taken away by the trial court.

V. THE COURT ERRED AND ABUSED ITS DISCRETION IN RELYING ON VARIOUS OTHER SPECULATIVE AND INSUBSTANTIAL FACTORS IN ORDERING A NEW TRIAL.

The Court's opinions (App. 241-243; 251-253) itemize the specific factors (including the alleged "weight of the evidence," "instructional errors" and hearsay factors discussed above) which caused the verdict to be set aside, specifically stating:

> The admission of prejudicial hearsay evidence and those listed above were the factors which led the Court to its conviction that to allow the jury's verdict to stand would result in a miscarriage of justice.

Analysis of these remaining factors shows they are completely insubstantial and further demonstrates the trial court's error and abuse of discretion in setting aside the first verdict.

A. *First Factor: That There was an Unfair Imbalance Between The Trial Time Consumed by the Plaintiffs and that Consumed by the Defendants.*

There was no unfair imbalance in the allocation of trial time. As is commonly the case, about 70% of the trial time was used by the plaintiffs and 30% by the defendants.*

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* The court's comment (App. 241) that the "plaintiffs were permitted to proceed at their own pace . . . for 13 weeks" must be qualified. The clerk's log shows the first "week" involved two days with a total of 7½ hours of testimony; the second "week" consisted of two days totaling 7¼ hours of testimony. The thirteenth "week" consisted of one afternoon totaling 3¾ hours of testimony. Of the remaining ten weeks, six were less than full weeks: one of them consisted of two days with a total of 11¾ hours' testimony; one consisted of three days with a total of 11½ hours of testimony; four involved four days with an average total of 14½ hours of testimony. The total hours of presentation of the plaintiffs' case were 171 hours. The total for the defense case was 68 hours. Plaintiffs' rebuttal case was required to be put in within one and one-half days, with night sessions, totaling 13 hours.

The trial court overlooked that a substantial part of the defendants' proofs went in during plaintiffs' case (as both defense counsel had advised the jury—274, 338); that defendants consumed about two and one-half weeks cross-examining one of plaintiffs' witnesses (5/28/76 through 6/15/76—pages 2669 through 4456 of the transcript); that defendants employed the tactic of reading virtually meaningless, time-wasting deposition testimony to the jury during the plaintiffs' case (e.g. 5028-34, 6910-66); that over 20% of the plaintiffs' case was consumed by argument over exhibits and related issues, since defendants objected at length to virtually every one of the plaintiffs' 700 exhibits;** and that defendants had a full right of cross-examination on all of the witnesses called by the plaintiffs, including their own officials when called adversely by the plaintiffs. During the plaintiffs' case a principal tactic of the defendants was precisely to delay presentation of the plaintiffs' case. When plaintiffs' case was completed, defendants were given a spectacular procedural advantage: a five-week adjournment in which to hone their defense.

More important, there is utterly no showing of prejudice to the defendants in the alleged time imbalance. During their case they usually ran out of witnesses before the end of the day and were looking for things to fill in the time. *They finished their case two full days ahead of their deadline* (11,766-8 and 12,095). No requests for additional time was made by the defendants. There is no showing or finding as to any excluded defense witness or evidence. No offer of proof was made as to evidence they allegedly

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** E.g. 412-39, 639-51, 682-720, 796-810, 789-92, 747-58, 763-85, 1076-86; 1098-1131, 1326-43, 1390-1413, 1544-79, 1601-10, 1689-1703, 1887-1930, 2081-91, 4834-69, 5541-56, 5712-38, 5799-5810, 6477-6501, 6668-6705, 7285-7315, 7555-7579, 7810-38, 8424-8220.

could not present. Defendants were offered and rejected the opportunity for evening sessions, which were agreeable to the court, the jury and plaintiffs' counsel (11,475-6). They were offered an opportunity for a recess, which would have made more time available later (11,449, 11,468) and rejected that as well (11,471, 11,477).*

Not only did the defendants make nothing of this "pressure" during the trial, but the court engaged in the purest speculation in suggesting (App. 241) that there was any impact whatsoever on the jury by virtue of it.

B. *Second Factor: That the Jury Was Possibly Confused by the Complexity of the Issues and Evidence.*

Defendants did not include in their post-trial motions a request for a new trial in the interest of justice generally or on the basis of jury confusion specifically. The trial court therefore lacked power to order a new trial on this ground on its own motion nine months after the verdict. F.R.Civ.P. 59(a),-(b),-(d).

Furthermore, the trial court did not *find* that the jury *was* confused but merely speculated it *may* have been confused. The record shows no sign of jury confusion. On the contrary, the fact the jury found for Aetna indicates they weighed the evidence, shared the Court's reservations about Aetna's knowing participation in the conspiracy and exercised a discriminating judgment accordingly. While we do not agree the finding for Aetna was correct under the evidence, it certainly negates the conclusion of the court, which itself differentiated between Aetna's possible liability and that of the other defendants, that the jury was confused.

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* There is some irony in the court's concern about alleged time pressure on defendants. Night sessions were imposed upon plaintiffs in their rebuttal jury argument beginning at 10:00 p.m., after a full day and evening of defense argument (13,840, 13,882).

The Supreme Court held in *Opper* v. *United States,* 348 U.S. 84, 95 (1954):

> To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of the jury to follow instructions.

The court's instructions on burden of proof and the several liability and damage issues were clear, unambiguous and correct. The jury is presumed to have followed these instructions and there is no basis in the record for supposing that they did not or that they were in any way confused. *United States* v. *Pappia,* 560 F.2d 827, 837 (7 Cir. 1977).

C. *Third Factor: That There Was Possible Duplication of Damages by the Jury.*

The court held (App. 242) a new trial was required because the jury *may* have been confused in determining the plaintiffs' damages because a "project" (as opposed to an individual) approach to damages was used and because the damages of the individual plaintiffs were waived.

The central fact of this lawsuit was the take-over of the Juneau Square project by the First Wisconsin defendants. The Juneau Square project was the plaintiffs' principal "business" and "property," destroyed and taken over by the defendants. All the plaintiffs were damaged in precisely the same way—by the loss of the Juneau Square project, the damages *res*—except that Juneau Square Corp. and Wil-Ten Co. claimed certain other consequential damages in addition. The respective ownership interests of the plaintiffs in the project were established by documents in evidence (PX 102-105, 111).

Throughout the trial *all* parties approached the damage issue substantially on the basis of the undivided value of the project taken from the plaintiffs (PX 264; WX 401-404 and 425). Quite unexpectedly, just before the case was submitted to the jury, the defendants requested and the trial court submitted over plaintiffs' objection a verdict form that required the jury to assess the damages of each plaintiff separately.

To avoid risk of confusion and duplication, the plaintiffs then waived damages for all individual plaintiffs, stating in argument (13,623-4):

> You have a right to . . . [award only nominal damages to the individual plaintiffs] *just to make sure there is no duplication here* . . . I want you to just award nominal damages to all the other plaintiffs, $100, something like that, just something to let us know that you realize they were in fact injured *but so we are safe and there is no duplication.*

The trial court also expressly instructed the jury (13,961) to consider the damages of each plaintiff separately and *not* duplicate. In the verdict the jury awarded $5.5 million damages to the plaintiff Juneau Square Corp., $500,000 to Wil-Ten Co. Inc. and $100 nominal damages to each of the other plaintiffs (App. 316-317).

The court again engaged in pure speculation in assuming the jury *may* have disregarded the court's clear instruction not to duplicate and *may* have been confused in assessing damages. It would have been error for the court to *find* the jury was confused or had duplicated because there is nothing in the record to uphold such a finding. To set aside a verdict merely upon the speculation that the jury *may* have done these things is entirely improper (*United States* v. *Pappia,* supra, 560 F.2d at 837) and constitutes clear error and abuse of discretion.

The trial court's view that "the defendant's are entitled to challenge the standing, causation and amount of damages awarded to each plaintiff" is wholly novel and without legal support with respect to the amount (as distinguished from the fact) of damages in the context of this case, where the measure of damages is the same as to all parties: the value of the business that was wrongfully injured and destroyed. Any alleged right of the defendants to have the damages allocated among the plaintiffs was mooted by the waiver of damages.

D. *Fourth Factor: That There Was Possible Jury Misconduct.*

The trial court held (App. 243, 252) a new trial is also required because there was "possible misconduct" on the part of the jury. The alleged misconduct was the reading of two news articles about the trial by an alternate juror.

Here too the court acted not on the basis of *found* misconduct but of *possible* misconduct. The only proof offered regarding this incident was the hearsay affidavits of one of the defense lawyers and a lay employee of his firm purporting to "summarize" an interview with an alternate juror. Affidavits of juror's themselves are not admissible to prove misconduct. *McDonald* v. *Pless,* 238 U.S. 264, 267 (1915). *A fortiori,* the hearsay affidavits are not probative. Even had the reading of papers not in evidence been competently established, it would not be ground for setting the verdict aside unless it were shown to have actually influenced the jury. *Colt* v. *United States,* 190 F.2d 305, 310 (8 Cir. 1911). The juror in question was an alternate who did not participate in the jury's deliberations. Any such misconduct on her part would be immaterial even if it existed.

The news articles themselves (in the record as court exhibits) are innocuous. The incident in question is entirely trivial and inconsequential. 6A Moore's *Federal Practice,* para. 59.08(4), at 59-136,-137. It was clear error and abuse of discretion for the trial court to consider an alleged incident such as this as a ground or factor in awarding a new trial, particularly in a case of this magnitude. F.R.Civ.P. 61.

E. *Fifth Factor: That Colorful Jury Argument May have Influenced the Jury.*

The trial court held (App. 243) a new trial was required for the additional reason that plaintiffs' counsel engaged in "colorful" argument which may have influenced the jury. It is rare that even prejudicial, misleading, or improper argument is a basis for a new trial. There is no other case in which "colorful" argument has even been criticized.

The arguments were well within the bounds of propriety. But the decisive factor is, even if the arguments had been in any respect improper, virtually no objections were made at the time of the arguments. Such objections are therefore waived and cannot be the basis for a new trial. *Kreinke* v. *Illinois Central Railroad Co.,* 249 F.2d 840, 845 (7 Cir. 1958); 6A Moore's *Federal Practice,* para. 59.08(2), at 59-109.

The *one* argument to which defendants made timely objection was the use of the term "slander" in reference to First Wisconsin's statement to New York Life Insurance Co., a prospective lender, that the plaintiffs had diverted loan funds. The trial court specifically found this charge by the bank to have been without foundation (App. 239). Plaintiffs' describing it as slander was fair comment and in no sense prejudicial.

VI. CONCLUSION

In addition to the order for new trial, other errors of substantial magnitude occurred during and after the first trial that must be confronted in the event the first verdict is not reinstated: dismissal on directed verdict of the plaintiffs' attempt to monopolize and monopolization claims (App. 201), granting judgment n.o.v. on the issue of restraint of interstate financing and exclusion of Aetna from the second trial upon denial of plaintiffs' contingent motion for a new trial as to Aetna. These issues are treated in Part Three of the Brief. The court's dismissal of Wil-Ten's claim is treated in Part Four.

We conclude this part of the brief by inviting the Court's attention to the theory of review of orders granting a new trial expressed in *Massey* v. *Gulf Oil Corporation,* 508 F. 2d 92, 94-95 (5 Cir. 1975):

> Our review of an order granting a motion for new trial is somewhat broader than review of an order denying a motion for new trial.
>
> * * * * *
>
> We noted that where the judge denies the motion and leaves undisturbed the jury's determination, all factors press in the direction of leaving the trial judge's ruling undisturbed. But where the judge has granted a new trial the factors oppose each other. Deference to the trial judge is subjected to opposing tensions of deference to the jury as the body to whom fact finding is constitutionally allocated and deference to the decision which the jury has reached pursuant to that authority. Furthermore, where a new trial is granted on the ground that the verdict is against the weight of the evidence, we exercise closer scrutiny than where the ground is that some undesirable or pernicious influence has intruded into the trial, because to an ex-

tent the judge has substituted his judgment of the facts and credibility of witnesses for that of the jury. Thereby we protect the litigants' right to jury trial.

We are confident this Court will give the evidence the scrutiny it requires and deserves, extensive though the record may be. Such scrutiny, we believe, will lead ineluctably to the conclusion that the trial was fair, that the jury was right and that the plaintiffs were unjustly deprived of their verdict. We ask this Court to redress that injustice.

PART TWO: IF THE FIRST VERDICT IS NOT REINSTATED, IN THE ALTERNATIVE THE SECOND VERDICT SHOULD BE SET ASIDE AND A NEW TRIAL ORDERED

In the second trial there were major instructional and evidentiary errors decisively prejudicial to the plaintiffs. In addition, the court imposed unprecedented restrictions on the manner and scope of plaintiffs' cross-examination, in sharp contrast to the extraordinary liberality accorded the defendants. The court also permitted defendants to edit deposition transcripts so as to distort their meaning and imposed arbitrary and unreasonable time limits at crucial points. These factors had a cumulative impact that was overwhelmingly prejudicial to the plaintiffs, deprived them of a fair trial and caused a miscarriage of justice.

I. THE JURY INSTRUCTIONS CONTAINED SUBSTANTIAL PREJUDICIAL ERRORS.

Giving an erroneous instruction or failing to give one properly requested is a ground for new trial. 6A Moore's Federal Practice, Sec. 59.08(2) at 59-105; *Callen* v. *Pennsylvania R. Co.*, 332 U.S. 625 (1948); *Wetherbee* v. *Elgin, J. & E. Ry. Co.*, 191 F.2d 302 (7 Cir. 1951).

A. *The Court Erred in the Instructions on Restraint of Trade.*

The court erroneously instructed the jury (II 10,578) in accordance with defendants' requested instruction 19A (App. 344) to the effect that (a) the antitrust laws are intended to protect competition, not competitors, and that (b) plaintiffs were required to prove actual injury to competition.

1. *Giving these instructions was wrong procedurally because counsel were not told in advance of jury argument that such instructions would be given.*

This failure violated F.R.Civ.P. 51 which states:

> The court shall inform counsel of its proposed action upon the requests [for instructions] prior to their arguments to the jury. . . .

The restraint of trade instruction as originally phrased by the court appeared at page 31 of the court's draft. The language of that draft was consistent with the court's memorandum and order requiring a new trial, which had stated (page 25):

> As the Court understands it, the parties concede that proof of specific public injury is not required. The plaintiffs need only show that the restraint "tends or is reasonably calculated to prejudice the public interest."

The original draft of the court's restraint of trade instruction was also consistent with the court's memorandum and order of February 22, 1978 (App. 263-267) rejecting the defendants' erroneous view of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and with comments made during the trial reaffirming that plaintiffs need only show that the restraint tends or is reasonably

calculated to prejudice the public interest. This was reaffirmed by the court's initial *rejection* of defendants' requested instruction 19A (II 10,142, S.App. 344). After final arguments, the court reversed itself and inserted the language from defendants' requested instruction 19A. This deprived the plaintiffs of a reasonable opportunity to argue whether such instruction should be given and, of course, any opportunity to argue the evidence to the jury in terms of the improperly revised instruction. Such a fundamental and significant change in the instructions at that stage of the proceedings was prejudicial error. *Hetzel* v. *Jewel Companies, Inc.,* 457 F.2d 527 (7 Cir. 1972); *Garland* v. *Material Serv. Corp.,* 291 F.2d 861 (7 Cir. 1961).

At every reasonable opportunity the plaintiffs voiced objection to the instruction in question. When the defendants originally requested their Instruction 19A, plaintiffs objected and the objection was sustained. Plaintiffs were entitled to assume, in view of F.R. Civ.P. 51, that if the court was going to reverse its ruling on an instruction already specifically rejected, it would timely advise counsel of that action. No such advice was given. After arguments were concluded, the court announced its decision to give the instruction and, although plaintiffs voiced their objection instantly, the court cut off any attempt to state grounds for the objection in advance of the actual instructions (II 10,545). When the court did permit the grounds for objections to be stated, after the instructions had been given, the court declined to correct the instruction (II 10,625).

The failure of the court to inform counsel of its intended change in the instructions prior to arguments to the jury is a ground for a new trial. *Frederic P. Wiedersum Associates* v. *The National Homes Construction Corp.,* 540 F.2d 62 (2 Cir. 1976); *Delano* v. *Kitch,* 542 F.2d 550 (10 Cir. 1976).

2. *The content of the instruction was erroneous because plaintiffs are not required to prove actual injury to competition.*

Plaintiffs are not required to establish actual injury to competition in civil actions under § 1 of the Sherman Act.*

The court correctly instructed (II 10,571-72) as to the three elements plaintiffs were required to prove: (1) that the defendants conspired to restrain trade; (2) that the restraint was unreasonable (i.e., that "it *tends* or is *reasonably calculated* to prejudice the public interest," II 10,578); and (3) that as a proximate result the plaintiffs suffered injury to their business or property.

After conclusion of the jury arguments, the court imposed upon plaintiffs the burden of proving a fourth element: *actual* injury to competition. In the eyes of the court, the legal basis for this added element was found in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977), *Magnus Petroleum Co., Inc.* v. *Skelly Oil Co.*, 599 F.2d 196, 204 (7 Cir. 1979) and *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495 (9 Cir. 1977).

Brunswick and *Lenore* were based on §7 of the Clayton Act. *Magnus* was primarily based on §3 of the Clayton Act. Unlike §1 of the Sherman Act upon which the instant case is based, §§3 and 7 of the Clayton Act require express proof of substantial anticompetitive effect. The trial court erred in importing this requirement into a Sherman Act §1 case.

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* *Radiant Burners Inc.* v. *People's Gas Light and Coke Co.*, 364 U.S. 656, 660 (1961); *In re McConnel*, 370 U.S. 230, 231 (1962); *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 16 (1964); *Switzer Bros. Inc.* v. *Locklin*, 297 F.2d 39, 47 (7 Cir. 1962); *Richfield Oil Corp.* v. *Karseal Corp.*, 271 F.2d 709, 728 (9 Cir. 1959).

Adding such an element was precisely the error addressed in *Rogers* v. *Douglas Tobacco Board of Trade, Inc.*, 266 F.2d 636, 639-640, 644 (5 Cir. 1959). In that case the judgment was reversed and a new trial ordered for virtually the identical instructional error committed by the court in this case. It was improper to ". . . add requirements to burden the private litigant beyond what is specifically set forth . . ." in the statutes. *Radovich* v. *National Football League*, 352 U.S. 445, 454 (1954); *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

The court's use of the graphic and attention-getting phrase to the effect that the antitrust laws are meant to protect competition, not competitors, was also error in the context of this case. That phrase was used in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc., supra,* (in which the plaintiff asserted "injury" from maintenance of competition) to illustrate a highly technical point in a merger case under §7 of the Clayton Act: that a competitor may not use the antitrust laws as a shield against legitimate competition. The same language was used in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962), another merger case.

Defendants' requested instruction 19A, which the court ultimately gave in substance, lifted the "competition, not competitors" phrase out of context and gave it a very misleading meaning, implying the plaintiffs did not have standing to assert injury to themselves as competitors. It told the jury, in effect, to disregard as irrelevant the extensive evidence that the defendants had conspired to destroy their principal competitor; that activity aimed at a competitor cannot be part of a conspiracy to restrain competition. The instruction fails to take into account competition can be restrained by destroying a major competitor. Applying

Brunswick, intended as it was for the merger case where the plaintiffs' interests *opposed* competition, to the circumstances of this case seriously distorts the Sherman Act and *Brunswick* and misled the jury.

The court says its instruction ". . . was not a misstatement of the law." (App. 298). That is not the point. The plaintiff in *Brunswick* did not misstate the law. He misapplied the law. A correct "statement of the law" may be incorrect or inappropriate as an instruction. Here, the plaintiffs' interests did not oppose competition; they provided the major competition. A specific object of the conspiracy was to take the plaintiffs out of the market. By misapplying the *Brunswick* language, the court in effect told the jury the Sherman Act does not apply where the anticompetitive goal is reached by conduct aimed directly at a competitor. This was error.

B. *The Court Erred in Precluding Proof and Argument That Aetna Was Controlled or Manipulated by the Other Defendants, in Instructing the Jury that Aetna Could not be Found to Have Been a Member of the Conspiracy and in Directing a Verdict on the Issue of Whether Aetna's Refusal to Finance Was a Product of the Conspiracy.*

1. *The court erred in precluding proof and argument that Aetna was a conspirator or was controlled or manipulated by other defendants.*

It was error for the court to save out of the first verdict the finding in favor of Aetna. While no new trial should have been ordered at all, the new trial, once ordered, should have included all parties. (See Part Three of this brief.) Accordingly, the court should not have instructed (II 10,575; App. 323) that Aetna could not be found to have been a conspirator.

Even if not permitted to show Aetna was a conspirator, plaintiffs should have been permitted to prove and argue Aetna was used and manipulated by the other defendants. Plaintiffs were forbidden to do so on the specious ground that would require an amendment of the pleadings (App. 291). Defense objection to any such amendment was also sustained.

A fair reading of plaintiffs' third amended complaint leaves ample room for proof of control or manipulation of Aetna by the defendants.* Even a narrow construction of the complaint would allow that. Since of F.R.Civ.P. 8(f) mandates pleadings be construed liberally, the court's preclusion was error.

The unwarranted restriction against contending Aetna was controlled and manipulated caused emasculation of the deposition testimony of Walsh and Bush (and other Aetna witnesses) in which plaintiffs' cross-examination was substantially eliminated (II 6970-6997; II 7002-11, 7015-16). It also precluded proof and argument on the behavior of Aetna following the Shapiro contact, particularly its uncooperativeness in permitting alternate financing for East (described by the court at App. 205 et seq.), the handling of the foreclosure litigation and in the events surrounding and following the entry of the foreclosure judgments. Aetna and Marshall-Michigan carefully coordinated their foreclosure actions and were in continual contact. Aetna *was* manipulated, if one assumes it lacked conspiratorial scienter. Plaintiffs should have been allowed to prove and argue that.

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* Plaintiffs' third amended complaint, para. 6 and 16, especially 16A, -I, -J and -K, S.App. 538 et seq.

2. *The court erred in directing a verdict that the defendants did not interfere with the Aetna financing, declined March 11, 1969.*

At the close of the evidence (at II 10,145) the court granted defendants' motion to strike all evidence and to preclude argument that Aetna's March 11, 1969 refusal to finance Juneau Square East was due to any conspiracy among the defendants. The jury was instructed accordingly (App. 324).

This was a directed verdict that the defendants had not interfered with that proposed financing, and further that the jury could not consider defendants' *attempt* to interfere with that financing, even if it was declined for other reasons. This was error. There was sufficient evidence from which the jury could properly conclude the First Wisconsin's activities, pursuant to its conspiratorial plan, motives and intention embodied in the Shute-Shapiro memorandum and related evidence, were a substantial factor in causing the Aetna declination.

The First Wisconsin companies formed their intention and gave their instructions that Shapiro contact Aetna "March 10 or so." Shapiro had his instructions and information in time to do so. The objectives for the contact included blocking the financing for East and that the plan was carried out on schedule. It was stipulated this financing was declined on March 11, 1969 (II 6-7).

I Wigmore, §102 states the principle that proving intent to commit an act constitutes evidence the act was done:

> §102. *General Principle.* The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done. A plan is not always carried out, but it is more or less likely to be carried out. The existence

> of the plan is always used in daily life as the basis of an inference to the act planned. There is no question about the relevancy in general of such evidence:
>
> 1853, Bigelow, J., in *Cook* v. *Moore,* 11 Cush. 213, 216: "The existence in the mind of a deliberate design to do a certain act, when once proved, may properly lead to the inference that the intent once harbored continued and was carried into effect by acts long subsequent to the origin of the motive by which they were prompted."

In *Baughman* v. *Cooper-Jarrett, Inc.,* 391 F.Supp. 671 (D.C.W.D.Pa. 1975), the plaintiff claimed the defendants conspired to blacklist him. He testified to a threat made prior to the inception of the conspiracy. The court held:

> Wilson argues that this statement constitutes inadmissible hearsay which does not fall within the co-conspirator exception because it was made before any conspiracy could have begun. While we agree that there may not have been two or more conspirators involved at that point in time, *Frankel's statement falls within another exception to the hearsay rule. A person's declaration of intent to perform an act is admissible as tending to show that the act was in fact carried out as planned. See* Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285, 295-96, 12 S.Ct. 909, 36 L.Ed. 706, 710 (1892); Blackburn v. Aetna Freight Lines, Inc., 368 F.2d 345, 348 (3d Cir. 1966) (dictum); United States v. Annunziato, 293 F.2d 373, 377 (2d Cir.), cert. denied, 368 U.S. 919, 82 S.Ct. 240, 7 L.Ed.2d 134 (1961); Nuttall v. Reading Co., 235 F.2d 5446, 551 (3d Cir. 1956); Commonwealth v. Santos, 275 Pa. 515, 119 A. 596, 599 (1923). *Accordingly, we find that Frankel's statement was relevant and admissible to prove that Cooper-Jarrett thereafter contacted Wilson and other trucking companies in an effort to blacklist the plaintiff.* (Emphasis added.)

The evidence was therefore sufficient for the jury to find Aetna's March 11 turndown was caused by Shapiro's contact "March 10 or so."

If the turndown itself was not precipitated by the defendants, there was abundant evidence the defendants improperly controlled and manipulated Aetna thereafter to assist in blocking alternative financing for East. Examples include Aetna's serial delays and denials on air rights, First Wisconsin's encouraging Aetna to proceed with foreclosure by indicating directly and indirectly that there was a buyer waiting in the wings to take over the project, and coordinating of the Marshall-Michigan and Aetna foreclosures actions. The First Wisconsin had numerous contacts with Aetna beginning with the Shute-Shapiro contact until the plaintiffs were finally foreclosed out of Juneau Square. Aetna and its lawyers were in constant communication with the lawyers representing Marshall-Michigan and First Wisconsin, principally Mr. Huber. Huber influenced Aetna at several key points, including the framing of the second foreclosure action stipulation and the entry of the foreclosure judgments, which led directly to the First Wisconsin's consummation of the takeover.

C. *It was Error To Fail To Instruct as To the Illegality or Unreasonableness of Numerous Acts of the Defendants and To Instruct Instead that the Illegality of Various Acts of the Defendants Is Irrelevant.*

Plaintiffs requested a series of instructions on the propriety of various acts of the defendants to effectuate their conspiracy to restrain trade.* These included:

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* Following each of plaintiffs' requested instructions in the appendix is a memorandum of supporting legal authorities presented to the trial court (App. 330-343).

No. 18: Unreasonableness of Aetna/Marshall-Michigan agreement to, in effect, maintain artificial judgment against plaintiff Juneau Square Corporation and Aetna assignment of deficiency judgment to Marshall-Michigan (App. 330).

No. 19: Bank's duty to disclose decision to acquire customer's property (App. 333).

No. 20: Unreasonableness of bank's breach of confidentiality of customer's credit information and misuse of such information for bank's own noncredit purposes (App. 334).

No. 21: Unreasonableness of unauthorized letter from defendant Marshall-Michigan to tenants of plaintiff Juneau Square Corp. diverting rental income (App. 335A).

No. 22: Abuse of mortgage foreclosure process (App. 337).

No. 23: Commencement of multiple lawsuits (338A).

No. 24: Effect of state court stipulations and judgments (App. 339).

No. 25: Slanderous and defamatory character of credit report by defendant bank to New York Life Insurance Company (App. 339A).

No. 26: Unreasonableness of secret agreement between two defendants to circumvent possible injunction (App. 341A).

No. 27: Illegality of assignment of part of deficiency judgment against plaintiff Juneau Square Corp. from one defendant to another (App. 342A).

No. 28: Extortionary nature of certain demands by a defendant for payment of a note (App. 343).

The foregoing were accompanied by an additional instruction, which was given, that acts of the defendants were to be considered by the jury only if they were done as a part of an antitrust conspiracy. The court declined to give the requested instructions and instead specifically instructed (II 10,586-7) that whether such acts violated laws other than the antitrust laws is irrelevant and not to be considered (App. 324).

The court was correct in saying such acts should be considered only insofar as they were part of a conspiracy to restrain trade, but incorrect in saying the rightness or wrongness of such acts under other laws is irrelevant and not to be considered.

The wrongfulness or unreasonableness of specific business conduct is relevant to:

1. Establishment or corroboration of predatory intent and motivation: *Utah Pie Co.* v. *Continental Baking,* 386 U.S. 685, 696-7 (1967); *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U.S. 464 (1962); *E. B. Muller and Co.* v. *F.T.C.,* 142 F.2d 511, 517 (6 Cir. 1944).

2. The existence of a conspiracy, inferrable from business behavior: *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.,* 394 U.S. 700 (1969).

It is the judge's fundamental duty to tell the jury what is legally improper, so that it can make these determinations. Because the court failed to perform its duty, the defendants were able to and did claim innocent conduct and motivation without effective opportunity for challenge.

A key example was the self-serving assertions the court permitted Huber to make that his letter to tenants (PX 164, App. 376) demanding diversion of the Juneau Square rents away from the owners was legal. Plaintiff's contro-

verting evidence (the foreclosure judge's decision castigating Huber PX 168) was refused (II 7847), as was the instruction which would have allowed the jury to decide for itself the innocence of Huber's intent (App. 335A).

The entire defense was geared to the proposition that the bankers and lawyers acting for the First Wisconsin companies and Marshall-Michigan were engaging in normal, acceptable business practices with legitimate business motives. The plaintiffs' theory of the evidence relating to those acts was that they were not normal or acceptable, but tortious and predatory, showing conspiratorial motive and intent. It was prejudicial error for the court to refuse to instruct under plaintiffs' theory of the evidence. *Florists' Nationwide Telephone Delivery Network* v. *Florists' Telegraph Delivery Association,* 371 F.2d 263, 270 (7 Cir. 1967).

D. *The Court Erroneously Failed to Give Plaintiffs' Requested Instruction 16: Use of Unfair Methods to Destroy Competition as a Per Se Violation of the Sherman Act.*

The jury should have been given the option to find a per se violation of §1 of the Sherman Act as set forth in plaintiffs requested instruction 16 (App. 329). The restraint of trade charged against the defendants is not one which can be commercially justified. It was a naked destruction of competition, on no higher moral or legal plane than price fixing or a boycott.

The classic description of per se violations of §1 of the Sherman Act was given in *Northern Pac. R. Co.* v. *United States,* 356 U.S. 1, 5 (1958):

> However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively

> presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

In *White Motor Co.* v. *United States,* 372 U.S. 253, 261 (1963), the test of the legality of a restraint of trade was stated to be whether it merely regulates and thereby promotes competition or whether it is such as may suppress or destroy competition. That per se rules of illegality are appropriate for manifestly anticompetitive conduct was reaffirmed in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36, (1977).

In cases involving such anticompetitive and reprehensible conduct the Supreme Court has not hesitated to focus on the nature and propriety of the defendants' conduct more than on the extent of its impact on competition. Indeed, the elimination of a single competitor by group action was held to be a per se violation in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207, 210 (1959).

The propriety of applying per se rules here is reinforced by *United States* v. *General Motors,* 384 U.S. 127, 148 (1966):

> The protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws. We cannot respect that solicitude by closing our eyes to the effect upon price competition of the removal from the market, by combination or conspiracy, of a class of traders. Nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely.

The use of unfair methods by one substantial competitor in the market as part of a conspiracy to destroy another substantial competitor in the same market has been held

to be a per se violation of § 1 of the Sherman Act. *Van Dyke Ford, Inc.* v. *Ford Motor Company,* 399 F.Supp. 277 (E.D. Wis. 1975); *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.,* 57 F.2d 96 (1 Cir. 1932), cert. den. 286 U.S. 552; *Atlantic Heel Co.,* 284 F.2d 879 (1 Cir. 1960); *Perryton Wholesale Inc.* v. *Pioneer Distributing Co.,* 353 F.2d 618 (10 Cir. 1965); cert. den. 383 U.S. 945; *Tower Tire & Auto Ctr. Inc.* v. *Atlantic Richfield Co.,* 392 F. Supp. 1098 (S.D. Texas 1975).

That in the so-called *Pick-Barth* cases which some courts have criticized is not present here, namely the possibility of incorporating the general law of unfair competition into the ambit of the antitrust laws. We are not dealing here with "unfair competition" in the traditional sense. The plaintiffs and the defendants were indeed competitors, but the defendants were not using the *competitive process* as the vehicle for their attack on the plaintiffs. Instead they destroyed a competitor by direct and improper means. The defendants' jugular thrusts were intended to and did remove their main competitor from the relevant market once and for all by destroying the plaintiffs, taking over their existing property and preventing construction of a major commercial office building. Defendants did not attempt to injure or destroy the plaintiffs through competition, fair or unfair. They intended to destroy the plaintiffs directly in order to avoid competition from them. The motive of the defendants is precisely anti-competition. Their conduct impairs competition precisely by destroying a major competitor. Such conduct fits the description of activity "so inherently anti-competitive that necessarily unreasonable restraint was present, so that no inquiry respecting such (unreasonableness) is required." *Redwing Carriers, Inc.* v. *McKenzie Tank Lines, Inc.,* 443 F.Supp. 639, 643 (Fla., 1977).

We can conceive of no circumstances where a direct attack by one major competitor upon another resulting in the loss of a substantial participant in the competitive market could be anything but an unreasonable restraint of trade. The defendants have never suggested any circumstances under which their conduct could be regarded as reasonable.

E. *The Court Erred in Its Instructions on Mortgage Foreclosure Law.*

Plaintiffs showed the defendants' manipulation of the foreclosure actions was a principal means of accomplishing the conspiracy. The plaintiffs' theory of this evidence was prejudiced by an instruction on mortgage foreclosures which said the plaintiffs were virtually helpless in the foreclosure actions, gave up nothing in exchanging their defenses and equity of redemption for an air rights agreement. Aetna and Marshall-Michigan thus were able to assume a pose of tolerance. Under the instructions given the jury could not possibly understand the relative positions of the parties before and during the foreclosure period, the most important time period in the case.

At II 10,582 (App. 326) the court told the jury:

> In order to assist you in evaluating the conduct of the parties, the following instructions set forth the applicable law governing various transactions raised by the evidence.

The instructions which followed not only failed to provide the criteria needed to fairly evaluate numerous wrongful acts and transactions of the defendants. Its description of mortgage foreclosure law was substantially incorrect, unbalanced and lacking in important rules essential to a fair understanding of the case.

Among other things the court instructed the jury (II 10,587; App. 326):

> When a mortgage is in default, several things may occur. Holders of defaulted mortgages may grant the property owner additional time in which to discharge his obligations under the mortgage, but such extensions are entirely voluntary, are not required by law and may be made subject to any conditions the mortgage holder wishes to impose in order to protect its interest. If such an agreement is not made, the holder of the mortgage must invoke the aid of the Court to enforce the provision of it, of this mortgage agreement. The mortgagee is authorized by law to foreclose on that mortgage and requires the property owner to either one, pay the full amount of the debt immediately if the mortgage so provides or two, relinquish to the holder of the mortgage all rights in the mortgaged property.

This is not the law. If the mortgagee accelerates the mortgage, he is *required* to give the mortgagor a reasonable time to pay the amount due, what is reasonable being determined by the circumstances of each case. *Haase* v. *Blank,* 177 Wis. 17 (1922), 8 Call. Wis. Pl. & Prac. §69.04, pg. 186-7. Where the mortgage balance is over $4 million, the payments to the mortgagee are current (the default here was on payment of real estate taxes) and the mortgagee's claim is subject to equitable defenses, a "reasonable time" would obviously be substantial.

The statement that extensions of time ". . . are entirely voluntary, are not required by law and may be subject to any conditions the mortgage holder wishes to impose in order to protect its interest" was additionally misleading because it plainly suggests the stipulations in the mortgage foreclosures actually contained "extensions of time" (they "extended" no time) and were a gift made from a spirit of cooperation toward the Juneau Square develop-

ers. In fact, the Juneau Square developers took on deadlines and waived their defenses, counterclaim and equity of redemption to get the air rights needed to complete East. Contrary to the instruction, an equity court could have *required* an extension of time or required other accommodations to Juneau Square's need. That is the nature of equitable jurisdiction, which the court completely misdescribed by casting foreclosure law in a series of iron rules.

Similarly, the court erroneously told the jury:

> If the failure to pay real estate taxes constitutes a default under the terms of a mortgage, and the mortgagee is entitled to payment of the full amount of the mortgage upon default, payment of the real estate taxes would not bar the mortgagee from maintaining a foreclosure action. A foreclosure suit is legal proceeding supervised by a court, rules of equity or fairness are applied to such proceedings to insure fair treatment of both the creditor and the debtor. If the judge finds that the property owner has defaulted on the mortgage, he will enter judgment in favor of the mortgage holder (II 10,588; App. 327).

A mortgagee can only maintain his foreclosure action after the default has been cured if an equity court says he can. "Once any statutory requirements [for foreclosure] are met, the court can exercise the usual broad powers of a court of equity in determining rights and liabilities in granting relief." 8 Call. Wis. Pl. & Prac., Section 6920, p. 200. The statement that curing the default "would not bar the mortgagee from maintaining a foreclosure action" is tantamount to saying the foreclosure judgment would be entered. This squeezes any meaning from the canon that a mortgage foreclosure action is governed by equitable principles. *Mutual Fed. Savings & Loan Assn.* v. *American Medical Services, Inc.*, 66 Wis.2d 210, 223 N.W. 921

(1974); *Wisconsin Brick & Block* v. *Vogel,* 54 Wis.2d 321, 195 N.W.2d 664 (1972). The error is magnified by the statement that "if the judge finds that the property owner has defaulted on the mortgage, he will enter judgment in favor of the mortgage holder." This ignores equitable defenses such as equitable estoppel, which could preclude a judgment of foreclosure even though there was a default —a consideration clearly applicable in the case of Juneau Square. *Hoffman* v. *Red Owl,* 26 Wis.2d 683, 133 N.W.2d 267 (1965); *Gabriel* v. *Gabriel,* 57 Wis.2d 424, 429, 204 N.W. 2d 494 (1973); *Wheeler* v. *White,* 398 S.W.2d 93, 96 (Tex. 1965); *Dickerson* v. *Colgrove,* 100 U.S. 578, 580 (1880).

The court's reference in the same instruction to "general and other unsecured creditors" is also clearly erroneous.

The court gave an erroneous and unbalanced standard supplied by the defendants, which like any half-truth was likely to mislead. The court said, in effect, that its errors were cured because ". . . the Court stressed that 'rules of equity or fairness are applied to such proceedings to insure fair treatment of both the creditor and debtor.'" (App. 302) The court did not "stress" that doctrine; it gave only that bare statement. The bare statement, juxtaposed with the iron and inaccurate rules enumerated by the court, gave the jury a false concept of what "rules of equity or fairness" are.* Taken as a whole, the court's instruction set forth a Draconian code, not a description of equity.

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* The court should have instructed in accordance with plaintiffs' requested instructions 22-1 and 22-2, which gave a balanced statement of mortgage law without the errors contained in the instruction discussed above. The court also erred in rejecting plaintiffs' requested instructions 22-3 through 22-6. See App. 337-338.

F. *The Court Gave an Erroneous Instruction on How the Jury Should Analyze the Evidence on Conspiracy.*

The court prejudiced the plaintiffs by the erroneous instruction to the jury that:

> . . . you may not pile inference on inference but may draw an inference only from facts or circumstances which you find to have been established by a preponderance of the evidence (II 10,561; App. 323).

This instruction is a fallacious cliche. It is prejudicial in a conspiracy case where the method of proof frequently requires "inferences on inferences." The phrase is nothing more than a derogatory way of referring to the reasoning process. It is quite proper for the jury to infer a fact from circumstantial evidence and for such a fact to be the basis for a further inference to the ultimate fact sought. I Wigmore on Evidence (3rd Ed.), Sec. 41 at 434; id., 1977 pocket part at 165; *Rose* v. *Ruan Transportation Corp.,* 214 F.2d 583, 585 (7 Cir. 1954). These authorities state the "inference on inference" cliche is invalid and that it is indeed proper and necessary to draw one *inferred fact* from another *inferred fact.* To instruct against such a reasoning process is prejudicial error in a conspiracy case. *Poller* v. *Columbia Broadcasting System, Inc.,* 396 U.S. 464, 473 (1962); Sullivan, *Antitrust* §109, pp. 311-315.

III. NUMEROUS ERRORS IN EVIDENTIARY RULINGS MATERIALLY PREJUDICED SUBSTANTIAL RIGHTS OF THE PLAINTIFFS.

A. *The Court Erred in Rulings Relating to Marshall-Michigan.*

1. *Prejudicial Rulings on The Boerema Deposition.*

Donald Boerema was Marshall-Michigan's managing agent for Juneau Square and knew more about the project than anyone else at Marshall-Michigan.

The court erroneously excluded his testimony on the feasibility of the Juneau Square project (II 3049), the quality of management (II 3949), the purpose of the Aetna moratorium agreement (II 3050), his understanding (shared by all at Marshall-Michigan) Aetna was to finance East (II 3053-4), that Marshall-Michigan and Juneau Square had a good relationship before the foreclosure period (II 3057), that the developers were efficient and honest (II 3057), that certain pre-conspiracy acts of Marshall-Michigan constituted approval of the concept to develop East (II 3060), that Marshall-Michigan initially intended (after Aetna commenced foreclosure) to cure the tax default and reinstate the Aetna mortgage (II 3969), and the change in attitude of Marshall-Michigan officials when the First Wisconsin contacted them (II 3070-72).

Excluding this testimony by a witness with broad personal knowledge deprived the jury of crucial evidence on what Marshall-Michigan knew and thought about the project prior to the conspiracy compared with the subsequent flow of disparaging comment and denials of knowledge, especially at the trial by Sann.

2. *Prejudicial rulings during the cross-examination of Sann*

John Sann, a New York lawyer and officer of Marshall-Michigan, was its witness-spokesman at the trial.

A central issue was Sann's accusation that he learned in the fall of 1969 plaintiffs had been "diverting" rental income from Juneau Square North and South (the "existing project," in which Marshall-Michigan had its interest) to build Juneau Square East. This was the claimed reason for Marshall-Michigan's change from friend to foe at the time plaintiffs contend Marshall-Michigan joined the conspiracy.

Marshall-Michigan knew from the beginning income from the existing project would be used to develop East. This was inherent in the three-phase development concept.

The court first precluded cross-examining Sann on his knowledge of the physical arrangement of the project, which makes it obvious East was contemplated in 1966 when Marshall-Michigan made its investment (II 8033). Plaintiffs then sought to confront Sann with a letter and accompanying Juneau Square Project Report (PX 601 and PX 113, S.App. 350) *from his own file* which described to Marshall-Michigan in 1967 how income from Juneau Square North and South would be used for the East development. Sann claimed ignorance of these and then said he probably did not read the report because it was "too long" (II 8080-81). Plaintiff should have been able to pursue such claims with Sann on the stand, where the jury could observe his reaction as he was shown to be testifying falsely. However, the court precluded use of the documents in the cross-examination of Sann, based on the hearsay rule, neutralizing the impeaching force of that evidence (II 8051-2, 8054, 8059-60, 8073-4). The letter (an internal Marshall-Michigan communication) and the report were not hearsay; they were being used to show notice. Even if hearsay they were admissible under the business records exception. Rule 803(6).*

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* These rulings should be contrasted with the permission given defendants (over objection) to question Spoden on internal Aetna documents never sent to or received by him and not yet received in evidence (II 3345; 3394; 3411; 3429). A similar contrast exists in the court's application of Rule 611(b) (scope of cross examination). While plaintiffs were not allowed to use Sann's own file to impeach his denials of knowledge of information in his documents (expressly permitted by rule 611(b)), free rein was given to defense counsel to cross-examine Spoden about complex questions of tax shelters which had not been remotely touched upon on direct and about which Spoden, a civil engineer by education and training, had no knowledge (II 716-89; 7200-22; 7231-02).

The court's rulings were extraordinarily harmful. They required the jury to take at face value Sann's claim that he had not learned until 1969 rental income from Juneau Square North and South would be used for the East development. It was prejudicial in the extreme to deny plaintiffs the opportunity to expose the falsity of his testimony while he was on the stand.

3. *Prejudicial rulings on Huber letter.*

Without the plaintiffs' knowledge or consent and without court authority, Marshall-Michigan, by its attorney, James O. Huber, sent a letter December 26, 1969 to the Juneau Square tenants (PX 164) demanding rents be paid into a Marshall-Michigan account rather than to Juneau Square Corp. Such a letter was illegal. *Wuorinen* v. *City Federal Savings & L. Asso.*, 52 Wis.2d 722, 727-729, 191 N.W.2d 27 (1971). See App. 335A-336A.

As discussed earlier, the court should have instructed the jury the letter (PX 164) was tortious. Instead the court elicited from Huber that the letter was sent out pursuant to a "provision in the mortgage that authorized this action" (II 7519). This implied, as confirmed by Huber, he had the right to send the letter (II 7730). The court initially permitted the plaintiffs to confront Huber with the decision of Judge Robert Landry, the judge in Marshall-Michigan's foreclosure action, which stated the letter was a substantial wrong-doing, likely to undermine the confidence of the tenants in the management of the project and to compromise the landlord-tenant relationship (II 7730-7734; PX 168). The court then permitted Huber argue his position (II 7730-7737). The following day the court reversed itself and ruled out Judge Landry's decision, but refused plaintiffs' motion to strike Huber's exculpatory arguments (II 7847 et seq.), Huber's testimony being allowed because "what Mr. Huber thought at

the time he issued that tenant's letter *is relevant to motivation''* (II 7861). The court thus accepted defense counsel's argument about the *relevance of Huber's state of mind* (II 7857).

The error and inconsistency in that combination of rulings are manifest. No jury should be bound to accept the lawyer-witness's assertion that he thought he was acting legally. The jury was entitled to an objective criterion, an instruction or at least controverting evidence that the letter was illegal, against which to measure Huber's claim. The clear inference of these rulings was that Huber was right all along. In fact he was wrong all along.

Moreover, if (as correctly held) Huber's state of mind as to whether he was acting legally was relevant on motivation, the jury was entitled to consider the reverse side of the same coin—the tortiousness of that act and other acts—in assessing defendants' motivation. Those involved in the letter to tenants (Huber, Bradley, Sann and Clarke) were all lawyers. The jury should have been told what the law was and then to make its own judgment as to whether those lawyers were all ignorant of the law.

4. *Prejudicial rulings on Clarke deposition.*

In his deposition Clarke, an officer of Marshall-Michigan, made vague charges against the plaintiffs. These charges were fabricated; they could only have been in good faith if he were ignorant of certain facts about the project (II 3132-49). By sustaining numerous defense objections to questions designed to test the credibility of his claimed ignorance on the ground such questions amounted to ''testimony by counsel,'' the court wholly distorted the true import of these depositions.

The Court here and elsewhere took the extraordinary position that when a witness denies knowledge of a fact,

further inquiry is thereby foreclosed. Plaintiffs were thus prevented from showing that by denying facts they obviously should know, defense witnesses were being evasive and not to be believed. Such cross-examination is especially important in conspiracy cases, where credibility, motive and intent play such important roles.

B. *The Court Erred in Rulings on New York Life Financing.*

The evidence on this important sequence was grossly distorted and erroneously edited by the court's rulings at the second trial.

1. *Prejudicial rulings on deposition testimony of NYL witnesses.*

The court prevented plaintiffs from impeaching hostile NYL witnesses whose testimony was offered by the defendants through deposition or prior trial testimony. For example, Boone's recollection of the critical NYL meeting of May 19, 1971 was claimed to be refreshed by notes which, it turned out, were not contemporaneous but instead had been added on to the NYL record during the course of this litigation when NYL witnesses conferred with Attorney Beckwith of Foley & Lardner. The same impeaching evidence was available with respect to Wilford. In both cases it was erroneously excluded (II 8504-5; 8535-8541; 8565-8578).

Further the court prohibited plaintiffs from advising the jury when NYL witnesses were being questioned by Beckwith, who was their lawyer as well as the First Wisconsin's (If 4105-6, 4349, 4378). The court also excluded PX 422, the Martindale-Hubbell listing showing Foley & Lardner represented NYL (Order of 6/13/78). The involvement of that firm and the contacts between NYL and the First Wisconsin officials made that relationship rele-

vant both to what occurred in 1971 and to whether the witnesses were biased in favor of the interrogating lawyer (Beckwith).

2. *Prejudicial rulings during Rose testimony.*

In the second trial the defense brought Rose from New York to testify the unfavorable report from the First Wisconsin to NYL did not cause the May 19 declination and was not discussed at the committee meeting. The plaintiffs sought to impeach Rose with PX 419, an NYL committee brief already in evidence, which contained notes clearly establishing the credit report had indeed been discussed. The court interrupted the cross-examination and prohibited use of the impeaching evidence (because it was handwritten) even though the entire document was in evidence (II 8634-9). The court also reaffirmed a similar ruling made earlier as to handwritten notes on PX 383 (S.App. 445) (II 8642). These notes were part of business records in evidence without limitation. Separate qualification for each entry would not be required even when the documents were first offered. *United States* v. *Rose,* 362 F.2d 409 (7 Cir. 1977); *United States* v. *Reese,* 568 F.2d 1246 (5 Cir. 1977). Such a requirement would violate the liberalizing aims of the evidence. 4 Weinstein's Evidence, §803(6) [01] at 803-148 et seq. and -[07] at 803-178. It was error to exclude the handwritten portions of PX 383 and PX 419. Error was also committed by the exclusion of the first two paragraphs of PX 408 (S.App. 453). (See above at p. 87 et seq.)

3. *Erroneous editing of depositions, restrictions upon cross-examination and quashing the Little subpoena prejudiced plaintiffs' right to impeach the defendants' attempts to justify their credit report to New York Life.*

The central accusation in First Wisconsin's credit report to New York Life was that the Juneau Square de-

velopers had diverted construction funds loaned by the bank on the project (PX 404). The First Wisconsin defendants offered several stories to justify the report. As each was proved false they tried another. The order granting a new trial found the whole matter "fabricated." (S. App. 239). Reading the deposition of Austin Lett *fully and in sequence* shows (1) the serial attempts at justification were false and (2) it is *essential,* to prove the falsehood, to take the witness through a lengthy sequence of transactions and documents, because of the sophistication of the First Wisconsin's attempts justify the charge. The impeachment rests heavily on what the bank knew at various times and the inconsistencies in its claims and documents. The three main witnesses offered by the First Wisconsin to justify the accusation were Austin Lett (by deposition), who was in charge of the Juneau Square credit file when the diversion was alleged to have occurred; his assistant John Dickens (by prior trial testimony); and Albert Little, the only live witness, who made the report to New York Life.

In his deposition Lett had attempted three justifications for the diversion accusation; cross-examination showed each to be false. By clever editing the defendants read to the jury portions of the deposition which significantly changed its actual content and impact (II 6390-6403; 6409-10).

Plaintiffs requested the entire deposition be read in sequence. The court refused (II 6390-6403). Plaintiffs also counterdesignated testimony to restore the sense of the deposition and to convey a fair idea of how the witness's explanations had failed to hold up on cross examination. The court precluded these as "outside the scope" of testimony selected by defense counsel (II 6546-6552; 6564-5). The entire deposition dealt only with alleged justification

for the diversion accusation and nothing selected by the plaintiffs could be outside the scope permitted by F.R.E. 611(b). More importantly, the precluded parts went directly to Lett's credibility. The complexity of his charges and explanations was such that chopping up the deposition and requiring it to be put into evidence in bits and pieces spread over the trial utterly destroyed the impact of the impeachment.

The court's post-trial decision gives no explanation for its rulings except to state (App. 306), "The Court exercised its discretion and *allowed the parties to decide their trial tactics and the best way to present their evidence.*" The court thus abdicated its duty under F.R.E. 611(a) to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . make the interrogation effective for the ascertainment of the truth."

A serious error occurred as to the witness Albert Little, who gave the false credit report and was the only live defense witness on the crucial report and its justification.

He took the stand with approximately 30 minutes remaining in the trial day (II 8145). Direct examination, which lasted 25 minutes (II 8158), covered his involvement in making the credit report to NYL and, over plaintiffs' objection there would be insufficient time to cross-examine on the point, testimony the credit report was true. In the few minutes remaining for that day, plaintiffs were unable to pursue the lengthy and complex line of questioning and document review needed to demonstrate the falsity of Little's testimony (II 8170-8172).*

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* Earlier in the trial, the court cautioned plaintiffs not to "cut off" the defense by turning Mr. Shapiro over for "cross-examination" at 5 p.m. (II 2294). That same concern should have been afforded plaintiffs in respect to Little.

Plaintiffs subpenaed Little to return for continued cross-examination on the next trial day. The court quashed the subpoena because of defense counsel's argument that subpenaing a Florida resident voluntarily within the district might not be valid, and because Little himself said it would be "inconvenient" for him to return and that he was unable to "add anything further" anyway.

No actual showing of inconvenience was even attempted. There was no basis in law for quashing the subpoena. In view of his being the only live witness on such crucial testimony, it seems incredible a claimed minor inconvenience, much less a hostile witness's unsworn assurance he had nothing more to contribute, should be accepted as an excuse to avoid cross-examination.

The court attempts to minimize the effects of the Little rulings by stating (App. 306) plaintiffs did get the witness to concede his report to NYL was incorrect if the records underlying it were incorrect. The points plaintiffs never got to make with Little went far beyond that: that (1) the underlying documents *were* incorrect, (2) Little knew the records did not support the diversion charge, and (3) he knew key records were missing. Plaintiffs were entitled to confront Little on these points while he was on the stand so that his demeanor could be seen by the jury and the impeachment done at a time and in a context the jury could understand. That is an essential part of the right of cross-examination. V Wigmore, Evidence, §1368 at 38. Thus, even if Little were available for later subpoena, the plaintiffs were entitled to continue their cross-examination at the time he was originally on the stand. Here, he was not even available later because he had gone back to Florida. The court's ruling was prejudicial error.

C. *The Court Erred in Rulings on Evidence of Reasons for Refusal To Finance.*

The evidence on the New York Life declination of financing was prejudicially circumscribed by the court's repeated ruling prohibiting agents of NYL from testifying as to why the loan was declined. Cisco and Krauss, officers of the Chicago and Milwaukee offices of Baird & Warner respectively and therefore officers of NYL's correspondent, were entitled to state NYL's reason for the declination (see discussion above at p. 82). VI Wigmore on Evidence (Chadbourn Rev., 1976), Sec. 1729, p. 146; *Lawlor* v. *Loewe,* 235 U.S. 522, 536 (1915) (Holmes, J.); *Greater New York Live Poultry C of C* v. *United States,* 47 F.2d 156, 159 (2 Cir. 1931); *American Cooperative Serum Assn.* v. *Anchor Serum Co.,* 153 F.2d 907, 912 (1946).

Instead of permitting this testimony, the court required the witnesses to omit facts and tailor testimony to accommodate the unrealistic sequence apparently perceived by the court as a reasonable substitute for the facts (see e.g., Krauss testimony at II 3670 and 3675 and Cisco record at II 4148). Krauss was prohibited from testifying to the reasons given him by Faulkner of NYL for the turndown (II 3620-60) and Cisco was precluded from giving similar testimony (II 4134, 4145, 4168). Moertl was also prohibited from giving such testimony, namely the explanations for declination given by Tishmann of Cooper-Horwitz (NYL) (II 603, 604), and by Cisco on behalf of NYL (II 670, 683; PX 800). These rulings gave the jury a prejudicially edited and erroneous picture of what occurred.

A similar error was committed during the testimony of Warren Stringer, Milwaukee representative of Metropolitan Life Insurance Company for approximately 30 years and personal friend of most of Metropolitan's mortgage loan officers (II 2836-37). He realized when he received

the "sterotyped boiler plate" reasons for an unexpected and a sudden turndown of financing from Metropolitan, that they were "not the true reason for this turndown" (II 2839-2840). The court precluded this testimony in the second trial.

The court failed to recognize that where the declination of financing is the result of a boycott, interference or other illegal act, a "cover" explanation is *likely* to have the superficial appearance of validity. (See discussion at p. 72-73 above.) Here, the recipient of that explanation was one equipped to form a meaningful opinion on whether the explanation, in context, made sense. The fact that he recognized the explanation as a sham would clearly have helped the jury evaluate the evidence respecting the loss of the Metropolitan financing.

D. *Error in Excluding Reasons for Formation of Wil-Ten Associates.*

Wil-Ten Associates was formed in 1970 and recording of its articles withheld to avoid improper pressure on Mr. Stefan, a partner, and his corporate employer. The plaintiffs were by then convinced their set backs were not mere coincidence (II 606-8; PX 692).

Plaintiffs offered this proof to counteract the basic defense theme that plaintiffs had recently fabricated the idea of outside interference to try to recoup losses really attributable to other causes (e.g. II 10,350). The proof was admissible under Rule 803(3) as establishing plaintiffs' contemporaneous concern and state of mind long before this litigation was commenced. Moertl, as a party to and drafter of the partnership agreement, was well qualified to voice the reasons for it.

E. *The Court Erred in Excluding Evidence of the Real Estate Holdings of NML and of the First Wisconsin Companies.*

The Court erred in excluding PX 491 and PX 533, showing the real estate holdings of the First Wisconsin companies and NML. The size and power of these companies and the extent of their real estate holdings in the central business district were not only relevant but essential to determine their competitive position and power in the relevant market.

V. THE MANAGEMENT OF THE TRIAL PREJUDICED PLAINTIFFS.

The court failed in its attempt under F.R.E. 611(a) to manage the second trial fairly.

A. *Delays and Interruptions of Plaintiffs' Case.*

The court permitted direct examination of plaintiffs' main witness, Moertl, to be interrupted by nearly 4 days of alleged "voir dire." See II 1780, 1964. 1975, 2026, 2213, 2366. The court even allowed a half day adjournment during Moertl's cross-examination on the specious claim defendants needed time to study a "new" exhibit (PX 705A), which was in fact only a slight revision of PX 705 (already the subject of many hours of "voir dire") simplified by excluding a few items the court had ordered deleted (II 1964). Without cause, the court also permitted Moertl to be cross examined in shifts by different defense counsel (II 1976, 1982, 2366), with much repetition (II 2950-2989).

The court also required plaintiffs to waste considerable time reading irrelevant deposition testimony at the defendants' demand. See, e.g., Liek deposition at II 2871-2875 and Davey deposition at II 4238-51 and 4267-98.

B. *Unrealistic and Unfair Time Limits on Jury Argument.*

Admitting the possibility that it was committing error, the court allowed plaintiffs only four hours for opening argument and one hour for rebuttal (II-9975).

Before arguments began on June 14, plaintiffs filed a written request for a minimum total of six hours argument, with up to two hours for rebuttal. Plaintiffs had waived additional testimony to obtain at least these six hours (II 9954). The court denied the request (II 10,149), even though it had already allotted two full days for argument.

Considering the length of the case and the quantity of evidence the time allowed was too short to permit plaintiffs to fully argue their case. It proved impossible to respond to four full hours of defense argument in a mere hour.

The court suggests the necessary additional hour for argument would have cut into time allotted to other cases or extend argument into a third day (App. 307). A workable schedule giving each side six hours over the two allotted days had been presented to the court (II 9965-6). As it was, arguments were concluded early enough that jury instructions were moved up to the second day rather than the following morning as originally planned (II 10,016).

C. *Defendants Were Strongly and Prejudicially Favored by the Court's Management of the Examination of Witnesses and Application of the Rules of Evidence.*

Throughout the trial there was a marked difference in favor of the defense in the way the court treated the parties in their questioning of witnesses.

The defense was permitted to cut off the answers of plaintiffs' main witness, Mr. Moertl, on cross examination to "keep the witness to the subject" (II 1057, 1189). Plaintiffs were given no such help in attempts to keep the answers of defense witnesses responsive.* When plaintiffs objected to a rambling and non-responsive answer by one of the defense experts, the court unfairly accused counsel of trying to "short circuit the truth" (II 9722).** The Court's application of F.R.E. 611(b) (scope of cross-examination) was extraordinarily unbalanced. When plaintiffs attempted to confront defense witnesses with facts omitted from their direct testimony, the court frequently sustained objection on the specious ground that form of questioning amounted to "counsel testifying." Yet defense counsel were permitted this technique.***

Defendants were allowed to cross-examine witnesses by using letters *not* received by the witness and *not* in evidence (II 1250-1, 1343, 3345, 3371, 3374, 3394, 3429, 3512). Plaintiffs were almost uniformly denied the same opportunity on cross-examining defense witnesses, even though clearly related to matter covered on direct or to the wit-

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* A few examples include: Clark—II 3132; Bradley—II 4784, 4880; Holscher—II 5117, 5203, 5293, 5408-9 and passim; Urdan—II 8733, 8822-6; Sann—II 8008.

** Outside the presence of the jury the court later offered to make a corrective statement, which confirms the court was not purposely disfavoring the plaintiffs. Unfortunately, the critical comment typifies the reflexive way in which the court often reacted against the plaintiffs and in favor of the defendants.

*** Contrast, for example, the treatment of plaintiffs' cross of Rose (II 8606 and 8609-15) with the defense cross of Moertl (II 2996), Spoden (II 3341) and Kelly (II 7405).

ness's knowledge, where the witness had not specifically referred to the document on direct.*

A typical example occurred during the examination of Mr. Huber, who represented Marshall-Michigan in the mortgage foreclosure and wrote Marshall-Michigan's illegal letter to the Juneau Square tenants (PX 164, App. 376). He testified on direct to a purportedly complete sequence relating to the Marshall-Michigan mortgage foreclosure. When plaintiffs attempted to cross examine on significant facts Huber had *omitted* from the sequence and changed its meaning, the court sustained objection that such questions were "outside the scope of direct" (II 7663-7668; 7769-7772).

One cannot reconcile this impossibly restrictive and erroneous approach with the great latitude permitted to defense counsel in cross-examination—permitting extensive questioning of Mr. Spoden for example on matters not remotely approached in his direct examination, such as the complex tax shelter aspects of another witness's investment in Juneau Square (II 7166-7169; 7183-7189; 9803-9805; 9808-9810) or of a witness Mr. Rosenburg, about the unrelated troubles of his former lawyer (II 4595, 4604).

In the face of such procedural obstacles it would have been difficult for the plaintiffs to prevail even in the absence of the substantive instructional and evidentiary errors described earlier in this brief. The collective effect of all these elements made the final result nearly a foregone conclusion. It was in this second trial that justice miscarried, not in the first.

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* Examples: Shapiro re PX 699 (II 2443); Sann re PX 316, 317 (II 8020) and PX 601 (II 8034-5); Huber re PX 615 (II 7689) and PX 616 (II 775, 7843).

II. THE TRIAL COURT ERRED IN DIRECTING A VERDICT ON PLAINTIFFS' MONOPOLIZATION CLAIM.

The First Wisconsin defendants' position in the relevant market was reviewed and analyzed by David D. Martin, an expert economist called by the plaintiffs.* The First Wisconsin companies monopolized both the overall competitive office space market in the Milwaukee CBD and the sub-market of vacant office space as shown by its power to set rent rates (8654), predominantly by owning a substantial share of the vacant as well as the leaseable space in the market (8655-8656). They exercised their power in excluding the actual and potential competition of Juneau Square North, South and East and by retaining the Water Street properties. Their dominance rendered the market not competitive (8614-15).

Dr. Martin showed that although monopoly advantage may be temporary, it was yet worthwhile here since it facilitated leasing the bank's expensive new space (8617-8618). With an absorption rate for new space of only 200,000 square feet per year the First Wisconsin Center's large supply of new space would normally cause prices to decline (8619-21). The purpose and effect of the monopolization here were to hold high rental rates up, that probably would have been lower if Juneau Square and the Water Street properties had been in competitive hands (8621-2, 8658, 8678, 8813).

PX 499 (S.App. 493) showed record high rental rates were set for the Center because of the relative lack of competition (8656). The "competing space" considered by the First Wisconsin companies consisted of the Center, the MGIC Building, the First Federal Building and the Water

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* See Dr. Martin's qualifications at fn, at p. 6 above.

Street buildings. The First Wisconsin companies owned more than 67% of this space (8657).

Dr. Martin noted other significant factors:

1. Inherent barriers to entry to this market as a result of land acquisition, obtaining construction long term financing and lining up tenants (8623). For the First Wisconsin Center, for example, over four years elapsed between the decision to build and the first occupancy in September, 1973.

2. The bank as a dominant owner of space has power to inhibit entry since it is a prime source for construction money (8623-24).

3. Common directorships with potential competing suppliers of office space and potential consumers (tenants) giving the First Wisconsin a substantial competitive advantage (PX 593, 8629-30).

4. The bank's "deep pocket" (total assets $2.9 billion) allowing it to hold the Water Street properties and Juneau Square and thereby inhibit competition (8631-2, 8652, PX 566).

The monopolization described above caused damage to the plaintiffs and to the public in substantially destroying the plaintiffs, enabling the defendants to maintain artificially high rental rates for its office space and preventing development of other space in the market (8674-8688).

Yet the court ruled plaintiffs failed to show the First Wisconsin companies had monopoly power. The court reached this conclusion because of certain erroneous assumptions:

1. *That market power depends on some substantial share of the market, probably in excess of 60%* (App. 214-215).

The Supreme Courts rejected the "numbers" approach in *United States* v. *Columbia Steel Co.*, 344 U.S. 495, 527-28 (1948).* Market share was held to be only a factor to be considered in *United States* v. *United Shoe Mach. Corp.*, 110 F.Supp. 295, 343 et seq. (D. Mass. 1953, Wyzanski, J) (50% plus other factors may suffice.)

2. *That plaintiffs failed to show the defendants' market share* (App. 215, 218).

Completion of the First Wisconsin Center brought about 1 million square feet of office space on the market—the competitive space in the new building plus the space emptied in the Water Street properties. The only significant vacant competing space at that time was the approximately 295,000 square feet in the MGIC and First Federal office buildings (PX 499, S.App. 493). First Wisconsin thus held *77% of the competitively significant space.***

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* "We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed."

** Numerous other market comparisons are possible based upon the evidence. PX 591 indicates as of January 1975 3.4 million feet of office space had been built in the CBD since 1960. 3.1 million feet was occupied, leaving approximately 330,000 vacant. By eliminating the 100,000 feet of space available in buildings constructed before World War II, there was only 234,000 feet of vacant space in the entire CBD. The First Wisconsin Center alone accounted for 160,000 feet, just under 70%. However, it is the 77% share of the market the First Wisconsin itself considered to be competitively significant (PX 499; App. 493) that should be regarded as the fair index of its dominance.

3. *That plaintiffs failed to prove the power of others in the market* (App. 216).

The market studies in evidence showed the position of virtually *all* participants in the market. See pp. 7-9 above. More to the point, only the competitive space provided by MGIC and First Federal concerned the First Wisconsin itself.

4. *That First Wisconsin does dominate the market for available "first-class" space but overall the market is saturated with competing space and sellers* (App. 216-218).

The court incorrectly assumes office space is fungible, as shown by its considering the Century Building as competitive with the First Wisconsin Center. That building was built in 1926 (PX 591 Table II, p. L-00123). It is west of the river and has only 76,000 total feet, half full. Were the jury to consider whether this old building provided meaningful competition to the First Wisconsin buildings, it is most unlikely they would so find. Surely the First Wisconsin did not so regard it.

First Wisconsin's domination of "first-class" space is glossed over by the court. This is error: dominance of the *preferred portion* of the market is relevant to market power. *International Boxing Club, Inc.* v. *United States,* 358 U.S. 242 (1959) (championship boxing contests held different market from non-championship fights). The jury could consider "first-class" space as most likely to attract interstate renters and that the location, condition, amenities and prestige of newer office buildings are factors in weighing the significance of the part of the market the court concedes is dominated by the First Wisconsin.

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No. 80-517

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

JUNEAU SQUARE CORP., et al.,

Petitioners,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE et al.,

Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals
for the Seventh Circuit

BRIEF OF RESPONDENT AETNA LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Following the first trial of this case, the jury returned a verdict finding that defendant-respondent, Aetna Life Insurance Company, had not participated in an alleged conspiracy in violation of Section 1 of the Sherman Act. Although the trial court granted a new trial to the other defendants-respondents, who suffered an adverse verdict, it refused to set aside the verdict favorable to Aetna and denied petitioners' motion for a new trial against Aetna. Upon petitioners' eventual appeal, the Court of Appeals found no abuse of discretion by the trial court and affirmed the order.

It is the position of Aetna that none of the issues presented to this Court by the petition, even if determined favorably to the petitioners, would impair or affect the existing judgment in favor of Aetna. Therefore, in addition to the questions as framed in the petition, Aetna seeks consideration of the following question:

Regardless of how the Court otherwise disposes of the issues presented, should the petition be denied as to Aetna Life Insurance Company?

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BRIEF OF RESPONDENT AETNA LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

Aetna Life Insurance Company, a defendant below and a respondent here, was charged with participation in a conspiracy in violation of Sections 1 and 2 of the Sherman Act. Having won a favorable verdict in the first trial of this action, Aetna did not participate in the second trial that was granted to the other respondents, First Wisconsin National Bank of Milwaukee, et al.

In this Court, Aetna relies on that verdict, on the order of the trial court denying petitioners a new trial against it, on the affirmance of that order by the Court of Appeals and on petitioners' failure in this Court to raise any issue respecting that order. No issue presented here would affect the validity of the

judgment that has been entered in favor of Aetna. Consequently, regardless of whether the Court grants any part of the petition as against any other respondent, it is the position of Aetna that the Court ought to deny the petition as it pertains to Aetna.

At the close of petitioners' case during the first trial, the trial court granted the motion of Aetna (and the other respondents) for a directed verdict on petitioners' Section 2 claims (Appendix for Petitioners 31). On the Section 1 claim, the jury found that Aetna Life Insurance Company had not participated in the alleged conspiracy, although it found liability and substantial damages against the other respondents. (App. 204).

Thus, the first judgment entered in this action, while otherwise favorable to petitioners, dismissed petitioners' claims against Aetna on the merits. (App. 209).

On motion of the other respondents at the end of the first trial, the trial court set aside the verdict (insofar as it was adverse to them) and judgment and granted them a new trial. Petitioners had moved for a new trial against Aetna contingent upon the trial court's granting a new trial to the other respondents. However, acting under F.R.C.P., Rule 59(a), the trial court refused to set aside that part of the verdict favorable to Aetna and denied petitioners' motion for a new trial. (App. 51 at 93-94).

Indeed, the trial court said that, if anything, Aetna Life Insurance Company had suffered from the same prejudice that caused it to grant a new trial to the other respondents. (App. 51 at 93-94). Consequently, Aetna played no part in the retrial of this action.

The second jury returned a verdict favorable to the other respondents, finding that there was no conspiracy in restraint of trade. (App. 248). Thus, the judgment from which petitioners appealed to the Court of Appeals dismissed their entire claim on the merits. (App. 252).

On appeal petitioners sought a third trial against all respondents. They claimed that the trial court had abused its discretion in denying their motion for a new trial against Aetna. Petitioners did not claim that the trial court had erred in the admission or exclusion of evidence or in its instructions pertinent to Aetna; rather, their position was that because the trial court set aside the verdict unfavorable to the other respondents it should have set aside the verdict favorable to Aetna as well. (App. 1 at 24-25).

The Court of Appeals found no abuse of discretion by the trial court and affirmed its order. It said that the question of Aetna's participation in the alleged conspiracy was separate from the question of participation by others, and it said that F.R.C.P., Rule 59(a) expressly permitted partial new trials under these circumstances. (App. 1 at 24-25).

Petitioners do not in their questions presented or points of argument raise any issue concerning the correctness of the trial court's order denying them a new trial against Aetna or the Court of Appeals' affirmance of that order.

REASONS FOR DENYING PETITION

Since petitioners do not seek review of the order denying their motion for a new trial against Aetna, that order is now final and the issue of Aetna's participation in the alleged Section 1 conspiracy cannot be relitigated. In addition, since petitioners' Section 2 claim against Aetna was based upon the same alleged conspiracy, relitigation of that issue is now precluded. It follows that none of the relief that petitioners might obtain upon review by the Court of the issues they present can be granted against Aetna Life Insurance Company.

For these reasons, regardless of how the Court otherwise disposes of the issues, the writ should be denied as to Aetna.

ARGUMENT

NONE OF THE RELIEF THAT PETITIONERS MIGHT OBTAIN IN THIS COURT CAN BE GRANTED AGAINST RESPONDENT AETNA LIFE INSURANCE COMPANY.

I. REINSTATEMENT OF THE FIRST VERDICT AND JUDGMENT WILL NOT BE ADVERSE TO AETNA.

The principal relief requested by the petitioners here is that the trial court's order granting a new trial to the other respondents be reversed and the verdict of the first jury reinstated. This issue is raised in their Questions Presented for Review 1-4 and 7 and in Points I and IV of their Argument.

Aetna has no interest in the outcome of this issue because the verdict of the first jury (the only verdict involving Aetna) was favorable, and any judgment would necessarily favor it.

II. A THIRD TRIAL OF PETITIONERS' SECTION 1 CLAIMS COULD NOT INVOLVE AETNA BECAUSE THE ORDER DENYING PETITIONERS A NEW TRIAL AGAINST AETNA IS NOW FINAL.

Petitioners' next hope is that the Court will find error in the second trial (in which Aetna did not participate) and grant petitioners a new, and third, trial. The issues upon which they rely are stated in Questions 5-7 and points of arguments II-IV.

Petitioners, however, can have a new trial only against the First Wisconsin respondents, not against Aetna. This conclusion necessarily follows from their failure to raise here for review the correctness of the trial court's refusal to set aside that part of the first jury's verdict finding that Aetna did not participate in the alleged conspiracy and the trial court's denial of petitioners' motion for a new trial against Aetna.

This issue was raised in the Court of Appeals as a part of petitioners' effort to obtain a third trial against all parties. The Court of Appeals rejected that argument. (App. 1 at 24-25). It found no abuse of discretion by the trial court in the application of F.R.C.P., Rule 59(a), which provides that the trial court may order a new trial as to "all or any of the parties . . . " . Relying on *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 247 84 L.Ed. 1129, 60 S.Ct. 811 (1940), it said that the question of participation in an alleged conspiracy by one party is separate from the question of participation by others, so that the grant of a new trial to some on that issue does not require a new trial as to all. Finally, the Court of Appeals agreed with the trial court that the verdict in favor of Aetna was "reinforced" by the factors that the trial court found prejudicial to all defendants, including Aetna. (App. 1 at 24-25).

Petitioners here raise no question concerning this order, nor is that question subsidiary to or fairly included in any question or argument made by petitioners. Rule 21.1(a), Rules of the Supreme Court of the United States (June 30, 1980). The Court will not consider questions that are not raised in the petition for certiorari. *Namet v. U.S.*, 373 U.S. 179, 10 L.Ed.2d 278, 83 S.Ct. 1151 (1963).

The question of a new trial on petitioners' Section 1 claims against Aetna is not before the Court; the order of the trial court, affirmed by the Court of Appeals, denying petitioners a new trial against Aetna is now final. Whatever the merit in petitioners' argument that they are entitled to a third trial on their Section 1 claim, they cannot have it against Aetna.

III. A NEW TRIAL OF PETITIONERS' SECTION 2 CLAIM AGAINST AETNA IS PRECLUDED BY THE JURY FINDING OF NO PARTICIPATION BY AETNA IN THE ALLEGED SECTION 1 CONSPIRACY.

In the trial court, petitioners levelled three Section 2 charges at respondents — monopolization, attempt to monop-

olize and conspiracy to monopolize. At the close of petitioners' case in the first trial, the Court directed a verdict against petitioners, primarily because they had failed to prove the market power of the alleged monopolist, respondent First Wisconsin Bank. (App. 31 at 42-50). That holding was affirmed by the Court of Appeals. In this Court, petitioners claim that the courts below applied the wrong test of market power and that they are entitled to a jury trial on the issue.

A jury trial on this issue cannot affect Aetna. Petitioners conceded at the time of the directed verdict motion that their monopolization and attempt to monopolize charges were aimed only at respondent First Wisconsin Bank. (App. 31 at 42). Against Aetna their claim was that its participation in the Section 1 conspiracy supported the charge that Aetna conspired toward the achievement of a monopoly by the First Wisconsin Bank. (App. 31 at 50).

The trial court correctly held that the Section 2 conspiracy charge against Aetna fell for failure of proof of the underlying monopoly charges against the First Wisconsin Bank. The Court of Appeals affirmed and gave as an additional reason (Footnote 17, App. 30) that the failure of petitioners to prove a conspiracy in restraint of trade precluded a finding of conspiracy to monopolize.

The Court of Appeals is correct. The jury verdict that Aetna did not participate in a conspiracy to restrain trade necessarily means that Aetna did not participate in any conspiracy to monopolize or to attempt to monopolize. Section 1 of the Sherman Act dealing with restraints of trade and Section 2 of the Sherman Act dealing with monopolies "overlap in the sense that a monopoly under Section 2 is a species of restraint of trade under Section 1". *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 226 n. 59, 84 L.Ed. 1129, 60 S.Ct. 811 (1940); *William Goldman Theatres v. Loew's, Inc.*, 150 F.2d 738, 740 (3rd Cir. 1945).

A monopoly is one kind of restraint of trade. "Any arrangement that could be considered a combination or conspiracy to monopolize must necessarily also be an unreasonable restraint of trade offending § 1." Areeda and Turner, *Antitrust Law* (1978), Vol. III, § 839, p. 358. A party that has not conspired to restrain trade cannot be found to have conspired to monopolize or to attempt to monopolize.

The claims of the petitioners against Aetna, whether arising under Section 1 or Section 2 of the Sherman Act, were all based upon the claim that Aetna had conspired with the other respondents. Thus, the jury verdict — now final — finding that Aetna did not participate in a conspiracy in restraint of trade likewise conclusively determines that Aetna did not participate in a conspiracy to monopolize or to attempt to monopolize. Relitigation of petitioners' conspiracy claim under Section 2 is therefore precluded just as their Section 1 claims are foreclosed. *Cromwell v. County of Sac,* 94 U.S. 351, 24 L.Ed. 195 (1877); *Partmar Corp. v. Paramount Theatres Corp.,* 347 U.S. 90, 95 L.Ed. 532, 74 S.Ct. 414 (1953). For this reason, a new trial on petitioners' Section 2 claim cannot be had against Aetna Life Insurance Company even if this Court were to order such a trial against the other respondents.

CONCLUSION

We disagree with petitioners' statement of the case, especially their attempts to recharacterize the facts in a fashion contrary to the finding of the jury. Petitioners had more than a fair chance to prove their claims against Aetna, and they lost. Both courts below declined to give them another chance, and petitioners here do not raise any issue that would impair the judgment in favor of Aetna.

There is no merit to the petition, and Aetna Life Insurance Company urges that the writ be denied. The other respondents will speak more fully to those issues. In any event, since no issue raised by the petition would entitle the petitioners to any relief

against Aetna, even if the petition is granted as to any issue or as to any other respondent, the petition should be denied as to Aetna.

October 29, 1980.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARSHALL-MICHIGAN AND FIRST WISCONSIN RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in ruling that the district judge had not abused his discretion in granting defendants' motion for a new trial, where the district judge concluded that:

a) his management of the first trial had been prejudicial to defendants;

b) he had erroneously admitted unreliable and unfairly prejudicial hearsay;

c) he had erroneously admitted evidence which may have resulted in duplication of damages;

d) plaintiffs' contentions, particularly on critical issues in the lawsuit, were against the overwhelming weight of the evidence; and,

e) the first trial had resulted in a miscarriage of justice.

2. Whether the court of appeals erred in declining to reverse the district judge's denial of plaintiffs' new trial motion after the jury had returned a verdict on all issues for defendants in the second trial, where both the district judge and the court of appeals concluded that plaintiffs' objections to sundry jury instructions, evidentiary rulings, and matters of trial management, were in each instance without merit.

3. Whether the court of appeals erred in sustaining the district judge's directed verdict for defendants at the first trial on plaintiffs' monopolization claims under Section 2 of the Sherman Act, where plaintiffs failed to present any proof that defendants possessed substantial market power, even accepting plaintiffs' unsubstantiated and overly narrow definitions of the relevant geographic and product markets.

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARSHALL-MICHIGAN AND FIRST WISCONSIN RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents First Wisconsin Corporation, First Wisconsin National Bank of Milwaukee, First Wisconsin Development Corporation, and Marshall-Wisconsin Co., Inc. (collectively referred to herein as the "First Wisconsin defendants"), and respondent Marshall-Michigan Co., Inc., submit this brief in opposition to plaintiffs' Petition for a Writ of Certiorari.[1]

[1] Petitioners' petition and appendix will be cited in this brief as "Pet. _____," and "Pet.App. _____," respectively. References to the appendix filed herewith by these respondents are denoted "Res.App. _____." Plaintiffs' trial exhibits are cited as "PX _____," and defendants' as "WX _____."

I.

HISTORY OF THE LITIGATION

The plaintiffs commenced this civil antitrust action for treble damages in 1972. The first trial, which lasted five months, began on May 3, 1976, before Judge Robert W. Warren, who has presided over this case since 1973. On October 1, 1976, the jury returned the verdict in favor of the plaintiffs against Marshall-Michigan and the First Wisconsin defendants, but found that Aetna, another defendant, had not been a member of any conspiracy. Judgment was entered accordingly on October 26, 1976.

The First Wisconsin defendants and Marshall-Michigan filed a timely motion for judgment notwithstanding the verdict, or in the alternative for a new trial or a remittitur. Plaintiffs moved, *inter alia,* for a new trial as to Aetna if any relief were to be given to the First Wisconsin defendants or Marshall-Michigan on their motion. The trial court by memorandum order dated July 29, 1977, denied defendants' motion for judgment notwithstanding the verdict, but granted their motion for a new trial, and refused to upset the jury's verdict in favor of Aetna. (435 F.Supp. 1307, Pet.App. 51.)

Judge Warren ordered a new trial on a number of grounds, including that:

(1) The unequal trial time limitations placed upon plaintiffs and defendants put defendants at a substantial and unfair disadvantage—thirteen weeks for plaintiffs as opposed to little more than three for defendants (435 F.Supp. at 1324, Pet.App. 88-89);

(2) the admission into evidence of unreliable hearsay evidence which was highly prejudicial to defendants and should have been excluded (435 F.Supp. at 1322-1324, Pet.App. 85-88);

(3) plaintiffs' proof on the issue of damages resulted in confusion, was admitted erroneously in part, and resulted in possible duplication of damages (435 F.Supp. at 1325-1326, Pet.App. 90-91);

(4) since the jury had found that Aetna was not a member of any conspiracy, "the only loan transactions which are in any way linked to the First Wisconsin defendants are those involving Metropolitan and New York Life," and as to those transactions, plaintiffs' claims were against the "overwhelming" weight of the evidence (435 F.Supp. at 1322-1323, 1326, Pet.App. 82, 84); and,

(5) the prejudicial effect of the factors set out above was aggravated by the length of the trial and the complexity of the issues (435 F.Supp. at 1321, 1324-1326, Pet.App. 81, 89-90).

The trial court concluded:

> In the final analysis, the Court is persuaded that all of these factors affected the deliberation of the jury and resulted in a miscarriage of justice. The Court is not unmindful of the time and effort expended by the plaintiffs or the costs of a second trial, but these considerations must give way if justice is to be served. The defendants are also entitled to have their day in court. (435 F.Supp. at 1326, Pet.App. 92.)

The district judge also denied plaintiffs' motion for a new trial against Aetna (435 F.Supp. at 1326-1327, Pet.App. 93-94).

The second trial commenced on March 20, 1978, and lasted for three months. On June 19, 1978, the jury returned a verdict for defendants on all issues, and judgment was entered in favor of defendants on November 3, 1978. (Pet.App. 248-252.) Plaintiffs challenged the jury's verdict and sought to have the district judge order a third trial, but on July 31, 1979, the judge denied plaintiffs' motion for a new trial.

Plaintiffs thereafter filed their notice of appeal with the court of appeals seeking review of virtually every ruling adverse to them since the inception of the litigation seven years earlier.

After extensive briefing and oral argument in which plaintiffs exhaustively detailed their contentions with respect to the facts adduced at the two long trials and the manner in which these trials were conducted, the court of appeals on July 3, 1980, denying the appeal on all issues, affirmed the judgments for defendants.

Plaintiffs have now petitioned this Court for a writ of certiorari, asking this Court to reconsider the innumerable factual, evidentiary, trial management, and legal issues that have arisen in the eight-year life of this litigation.

II.

COUNTERSTATEMENT OF FACTS

Plaintiffs' Statement of the Case is misleading in that it treats as fact contentions that are contrary to the overwhelming weight of the evidence, and that are based on implausible inferences and pure speculation. Plaintiffs have for the most part simply ignored defendants' evidence. They have treated the facts as if this were an appeal from a grant of summary judgment or judgment notwithstanding the verdict. While we believe that the record amply supported defendants' motions for summary judgment and judgment notwithstanding the verdict, the trial court denied those motions almost entirely, and this is (with minor exceptions) an appeal (1) from a new trial order and (2) from a jury verdict for defendants.

The first portion of plaintiffs' Statement (Pet. 4-5) is particularly misleading in that it implies (without a single citation to the record) that the central feature of the evidence presented to the juries was a conspiracy between First Wisconsin and Northwestern Mutual Life Insurance Company (NML) to exclude plaintiffs from the Milwaukee rental office space market. No such conspiracy existed or was ever proven. The only evidence was that NML was willing to help anyone, including plaintiffs, who would improve the property near its

main office building which borders on both the First Wisconsin Center and plaintiffs' buildings. Indeed, plaintiffs offered relatively little evidence on this subject at either trial, probably because there was no evidence that any action of NML in any way disadvantaged plaintiffs.

The focus of both trials was First Wisconsin's alleged interference with plaintiffs' efforts to obtain mortgage financing for Juneau Square East, a new office building which plaintiffs proposed to build in downtown Milwaukee. The facts, *as viewed most favorably to the plaintiffs,* were summarized by the district judge (435 F.Supp. at 1309-1316, Pet.App. 54-56), and by the court of appeals (624 F.2d at 801-806, Pet.App. 1-4).[2] The facts material to this appeal are as follows:

Throughout their Statement of the Case plaintiffs seek to convey the impression that Juneau Square was a thriving real estate development in which any normal lender would have been pleased to invest. In fact, Juneau Square Corp. was drastically undercapitalized and had no resources to bear even the foreseeable losses during the construction and initial leasing phase of its building program, let alone the much greater losses that were ultimately incurred. Juneau Square Corp. was in grave financial trouble long before 1968 when First Wisconsin first became interested in the Juneau Square block, and the company managed to keep its exceedingly ambitious plans alive as long as it did only by, in plaintiff Jack Moertl's own words, "robbing Peter to pay Paul."

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[2] As the trial court noted (435 F.Supp. at 1309, Pet.App. 54): "In some respects, this presentation of the evidence emphasizes plaintiffs' theory of the case. For example, inferences which were urged by the plaintiffs will be referred to from time to time. This approach was adopted because of the nature of the motions before the Court [for judgment notwithstanding the verdict] and the fact that the jury found in favor of the plaintiffs [in the first trial.]"

First Wisconsin did not decide on the present location of its headquarters building or the amount of rental office space which would be available in that building until late 1968. By that time plaintiffs had already been forced to sell off a 50 percent interest in their property to defendant Marshall-Michigan, and undivided interests totalling an additional 25 percent to certain individuals. The severity of plaintiff Juneau Square Corp.'s financial plight as early as 1966 is indicated by the fact that it sold the 25 percent undivided interest without requiring the purchasers to pay their proportionate share of the Aetna mortgage. Juneau Square Corp. was thus in the untenable position of owning only 25 percent of the property, while remaining obligated to pay 50 percent of the Aetna mortgage and 100 percent of the remaining debts from construction of Juneau Square North and South.

The consequences were predictable. Cash flow was insufficient to pay expenses and financing charges. Plaintiffs obtained from Aetna a moratorium on principal payments but even this was insufficient, and plaintiffs defaulted on payment of their 1968 real estate taxes in the amount of nearly a quarter of a million dollars. This delinquency constituted a default under both the Marshall-Michigan and Aetna mortgages.

Plaintiffs hoped to cure their financial problems by the construction of a third building, Juneau Square East. They approached between 20 and 30 firms in an effort to obtain financing for that third building. Each application had a reduced probability of success, because Juneau Square Corp.'s debts were mounting steadily. (WX 417-419, Res.App. 1-4) Thus, plaintiffs never obtained the financing they sought for their proposed third building.

Despite their obvious undercapitalization and desperate financial condition, plaintiffs have chosen to blame their failure to secure financing for Juneau Square East on an alleged massive conspiracy participated in not only by the defendants, but by numerous lawyers from three law firms, officers of two

national insurance companies, and a prominent Milwaukee appraisal company. In addition, although plaintiffs did not name prospective lenders Metropolitan Life Insurance Company or New York Life Insurance Company as co-conspirators, they assert that employees of these companies (as well as of the defendants) lied to them, falsified their contemporaneous records, and testified untruthfully on the witness stand. These charges were rejected by the jury in the second trial, which after having listened to the evidence for three months, rendered its verdict for defendants on all issues.

In late 1968, First Wisconsin (which had been looking for a location for a new headquarters building for some time) settled on the block just west of Juneau Square and due south of NML's headquarters building. First Wisconsin proceeded to acquire that block on a confidential basis because it knew that if word got out that it was seeking to assemble several parcels of real estate in that area, the price would escalate.

It is neither unusual nor illegal, in connection with a major real estate project such as the First Wisconsin Center, to desire to acquire some adjacent property for furture expansion. The uniform testimony of First Wisconsin personnel was that that was the only reason for their interest in the Juneau Square block. That motive, however, did not meet plaintiffs' requirements because it had no antitrust implications and would not have supported a triple damage antitrust action. Consequently, plaintiffs developed their theory that First Wisconsin's motive was anticompetitive.

There was no evidence to support that theory, except plaintiffs' assumption that First Wisconsin would not want Juneau Square East built because no one wants more competition. This contention is contradicted by the testimony of the bank's officers that they did not expect significant competition from proposed Juneau Square East, because Juneau Square Corp. had informed them that East would be leased largely to

existing tenants in Juneau Square North and South that required additional space. First Wisconsin also believed that its building would be competing for a different class of tenants.

Moreover, the assumption that no one wants more competition, whatever merit it may have in ordinary circumstances, is incorrect when applied to a real estate project, such as the First Wisconsin Center, located in an undeveloped area. The far eastern part of the downtown Milwaukee area was, at all pertinent times, a relatively undeveloped sector of the City. The evidence shows that the firms having property in that vicinity favored further development even if the development was "competitive." Plaintiffs were themselves enthusiastic about the location of First Wisconsin Center, despite the fact that it represented additional and adjacent office space. Therefore, it cannot be inferred that it was contrary to First Wisconsin's interest to have another office building in the immediate area, and it also cannot be inferred that the benefits of further development in the area would not outweigh any possible temporary delay in the initial leasing of First Wisconsin Center.

Plaintiffs first sought financing for Juneau Square East from Aetna. On March 11, 1969, *before* First Wisconsin's representative contacted Aetna with respect to Juneau Square, Aetna definitively rejected plaintiffs' request for such financing. The foremost issue at the first trial—which issue that jury decided against plaintiffs and in favor of Aetna—was whether Aetna's refusal to finance Juneau Square East was the result of a conspiracy between First Wisconsin and Aetna. The jury said that it was not.

Plaintiffs failed to pay their 1968 real estate taxes, which was an act of default under both the Aetna and Marshall-Michigan mortgages. This default caused Aetna (in November of 1969) and later Marshall-Michigan (in January of 1970) to file foreclosure actions. The history of these actions, and the various settlement agreements made in connection with

them—along with Marshall-Michigan's attempt to forestall Aetna's suit by tendering to Aetna the amount of plaintiffs' tax delinquency, Marshall-Michigan's unsuccessful efforts in 1969 to sell its interests in Juneau Square to First Wisconsin "as is," and the steps taken by Marshall-Michigan to halt plaintiffs' apparent diversion of revenues from Juneau Square North and South for use in development of East—are summarized in the district court and court of appeals' opinions (Pet.App. 62-65 and 7-9, respectively), and need not be repeated here.

Suffice it to say that after two years of litigation and stipulations delaying foreclosure, plaintiffs twice failed to meet the deadlines prescribed in the settlement agreements for obtaining financing and, finally, on January 3 and January 4, respectively, Marshall-Michigan and Aetna entered their judgments of foreclosure. Plaintiffs' interests in Juneau Square were sold at a sheriff's sale on February 28, 1972, at which Marshall-Michigan purchased the property subject to the Aetna mortgage.

After the foreclosure Marshall-Michigan's attorney, John Sann, initiated negotiations on its behalf of Marshall-Michigan for the sale of Juneau Square to Baird & Warner. He offered to sell the property free and clear of all encumbrances, except the Aetna mortgage, to Baird & Warner for $1,175,000—an offer inconsistent with plaintiffs' theory that Marshall-Michigan was conspiring to turn the property over to First Wisconsin. Baird & Warner refused his offer. Sann then contacted Holscher of First Wisconsin, and they commenced negotiations. Those negotiations resulted in an agreement, and on March 25, 1972, Marshall-Michigan sold its interest in the Juneau Square block to Marshall-Wisconsin, a wholly owned subsidiary of First Wisconsin.

Most of the evidence offered by plaintiffs at both trials concerned First Wisconsin's alleged attempts to interfere with their efforts to secure mortgage financing for Juneau Square East. Of the 20 to 30 persons and firms contacted by plaintiffs

for financing after Aetna's rejection, plaintiffs were able to produce evidence of contact between First Wisconsin and any of the prospective lenders in only two instances—Metropolitan Life Insurance Company and New York Life Insurance Company. Specifically, both of these companies telephoned First Wisconsin to inquire about Juneau Square, a circumstance that is hardly remarkable or suspicious, (a) since banks are a normal source of credit information, (b) since First Wisconsin had provided the construction loan for Juneau Square South, and (c) since First Wisconsin was one of the creditors that would be paid if plaintiffs ever obtained new funding and made the property profitable.

Plaintiffs' allegations that First Wisconsin interfered with its Metropolitan and New York Life loan applications—the heart of plaintiffs' case—were rejected by the jury at the second trial. The facts pertaining to plaintiffs' unsuccessful attempt to obtain financing from Metropolitan are set forth in the district court opinion (Pet.App. 59-61, 82-83). The record indicates that Metropolitan declined to loan plaintiffs money for Juneau Square East because of tight market conditions and the availability of more attractive investment opportunities elsewhere.

Both the district court and court of appeals' decisions (Pet.App. 65-68, 83-86, and 9-10, respectively), likewise, discussed the facts concerning First Wisconsin's alleged role in New York Life's refusal to provide mortgage financing for East. The conclusion reached by both courts was that, as the trial judge wrote: "The overwhelming evidence indicated that the concern of the committee [New York Life's Real Estate and Mortgage Loan Committee, which declined plaintiffs' application] was the [financial unsuitability of the project's sponsor,] Midland bank." (Pet.App. 84; PX 388, p.1, Res.App.5.) The credit report purportedly given by First Wisconsin to New York Life, and its reference to the fact that plaintiffs may have mishandled funds was not, the record showed, "a factor in the loan rejection" (Pet.App. 84).

After two long trials, extensive post-trial motions, and thorough review by the court of appeals, plaintiffs now seek to take their case to yet a higher level. The facts do not warrant the further prolongation of this litigation.

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

The decision of the court of appeals is correct, and there are no special or important reasons to grant the writ. The appellate court decision does not conflict with any decision of this Court or any court of appeals, does not sanction any abuse of discretion or improper conduct by the trial court, and does not warrant further review. Plaintiffs have attempted to cast their complaints in the rhetoric of broad legal principles. The real disputes between plaintiffs and defendants, however, are the fact issues set forth in plaintiffs' and defendants' contrasting statements of the case, and the jury at the second trial definitively decided those issues in favor of defendants.

Plaintiffs, nonetheless, argue to this Court, as they did to the court of appeals, that the district judge abused his discretion in granting defendants a new trial after the first trial in 1976, and assert that the court of appeals erred in not ordering a third trial after the 1978 trial because of a variety of errors supposedly committed at that trial by the district judge. Neither of these charges is meritorious, and "review [of these contentions] would be of no importance save to the litigants themselves." *Rudolph* v. *United States,* 370 U.S. 269, 270 (1962). Certainly, the questions presented by plaintiffs are not of the character Rule 17 requires in order to justify scrutiny by this Court.

II.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE NEW TRIAL ORDER OF THE DISTRICT COURT.

A.

The District Judge's Finding That He Had Erroneously Admitted Prejudicial Hearsay Evidence Was Sufficient To Support His Granting Of A New Trial.

A reading of plaintiffs' Petition leaves the impression that the only significant ground for the district judge's grant of a new trial to defendants was his belief that the jury verdict in the first trial was against the weight of evidence. This impression is entirely inaccurate. As stated at pp. 2-3, *supra*, the district judge granted a new trial for a number of reasons, one of which was that he had erroneously admitted unfair, highly prejudicial and unreliable third and fourth hand hearsay evidence. This is the factor on which the court of appeals concentrated. As the court of appeals noted (Pet.App. 20), if a single ground supports the new trial order, it is not reversible. *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *Nuttall* v. *Reading Co.*, 235 F.2d 546, 548 (3d Cir. 1956).

The hearsay evidence in question, to which plaintiffs refer only in passing in their Petition (Pet. 21-22), is discussed in detail in both the district court and the court of appeals decisions (Pet.App. 85-88 and 15-20, respectively). Although the court of appeals held that the admission of this evidence was—even without taking into account the numerous other factors cited by the district judge—sufficient to justify the awarding of a new trial, plaintiffs almost entirely ignore the subject in their Petition.

Both the trial court and the court of appeals focused on two items of hearsay evidence which were erroneously admitted. These items related to the critical issue of the credit report New York Life obtained from First Wisconsin on Juneau Square.

First, plaintiffs' principal witness, Jack Moertl, was permitted to testify that Jack Cisco (one of plaintiffs' loan brokers) characterized the oral credit report given by Little of First Wisconsin to Davey of New York Life—which Davey, in turn, purported to summarize in a memorandum—as an "Al Capone" credit report which portrayed plaintiffs as "crooks." Moertl was allowed to testify that Cisco further told him that it was this report that caused New York Life to refuse to provide financing for the project. Cisco did not testify at the first trial, and there was no evidence as to the source of his information. It was clear, however, that he had never seen Davey's written report of the conversation with Little, much less heard Little make that report, and it was also apparent that Cisco was not present at the New York Life meeting where the financing was rejected.[3] Consequently, the testimony admitted was at least triple hearsay—Moertl testifying as to what Cisco had told him based on what some unidentified person had told Cisco about the impact of what was in Davey's memorandum of his conversation with Little.

This testimony, to which plaintiffs' counsel alluded throughout the first trial, was highly prejudicial to First Wisconsin for two reasons. First, it attributed New York Life's rejection of the Juneau Square application to a credit report on plaintiffs, whereas all the New York Life witnesses testified that it was Midland's inadequate resources that caused the rejection. Second, this hearsay conversation characterized as an "Al Capone" report what First Wisconsin contends was nothing more than a truthful response to Davey's inquiries phrased mildly in view of the actual facts.

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[3] Cisco did testify at the second trial and admitted that his statements to Moertl were based on statements made to him by persons not present at the New York Life meeting.

This unreliable testimony was offered under the representation that it was not being introduced for the truth of the matters asserted in the conversation. Yet as the district court pointed out (435 F.Supp. at 1323, Pet.App. 86), plaintiffs' counsel repeatedly emphasized the Cisco's purported "characterization" of the Davey report as if Cisco's inflammatory statements were entirely true. Plaintiffs' counsel, for example, concluded his discussion of the New York Life turndown in final argument at the first trial with the observation that: "That is what happened in 1971, and that is how we get that report that puts these people in such a terrible light and that is the Al Capone Report."

Second, plaintiffs were permitted to introduce other highly prejudicial hearsay evidence bearing on the central factual issue in the case, New York Life's rejection of plaintiffs' loan application. PX 408 is a perfect illustration of the validity and importance of the policies which have long led the courts to exclude hearsay evidence. In his memorandum (PX 408) New York Life Real Estate and Mortgage Loan Committee Chairman Lutz implicitly charges First Wisconsin with trying to stop New York Life from providing financing to plaintiffs based on alleged conversations between First Wisconsin officers and another of plaintiffs' brokers, Dick Krauss. The prejudicial nature of the memorandum is apparent, and the uncontroverted evidence is that the report on which it was premised was totally false—an error resulting from the multiple levels of hearsay involved.

The charges recounted in PX 408 caused Lutz to investigate the matter. His report of his investigation (PX 406, see also PX 407, Res.App. 6-8) exonerated First Wisconsin and cast further doubt upon the veracity of Krauss, who (Lutz wrote) "is considered capable of doing anything to make a deal." Lutz' statements in PX 408 are fourth level hearsay. First Wisconsin's alleged comments were filtered through Krauss, Faulkner, and Wilford before they got to Lutz. As

indicated in PX 406 (Res.App. 6), Krauss, when asked directly, said he had simply received general inquiries from First Wisconsin. This is also what Krauss, who was plaintiffs' witness, said under oath at the second trial. He added that in the course of his business he regularly made and received calls to and from other Milwaukee firms with real estate interests, including First Wisconsin, for the purpose of exchanging information and that the calls in question were in that category.

Moertl's conversation with Cisco in which Cisco purportedly said that the financing had been killed by an Al Capone credit report, and the Lutz memorandum just described, were—as both the district judge and the court of appeals recognized—central to plaintiffs' case at the first trial. Though clearly inadmissable, this dramatic evidence provided the foundation for plaintiffs' contention that First Wisconsin frustrated Juneau Square's efforts to obtain financing from New York Life and was frequently reiterated by plaintiffs during the first trial.

B.

The District Court Applied The Proper Standards In Setting Aside The First Verdict Based On The Overwhelming Weight Of The Evidence.

The district court's decision to set aside the first verdict and to order a new trial was, as noted above, based on a multiplicity of factors. Although the court of appeals concentrated on the prejudicial hearsay evidence discussed in the preceding section of this brief, it also stated that: "We have examined the remaining factors upon which Judge Warren relied and they indicated that he was remarkably thoughtful and candid in evaluating the prejudice that certain of his actions may have caused defendants." (Pet.App. 20.) One of these factors was that on issues crucial to plaintiffs' case, the evidence "overwhelmingly" favored defendants. (Pet.App. 84.)

The trial court's understanding of the legal standards applicable to a new trial order is set forth at 435 F.Supp. 1321 (Pet.App. 81-82), and is consistent with the decisions of this Court. *Montgomery Ward & Co.* v. *Duncan,* 311 U.S. 243, 251 (1940); *Byrd* v. *Blue Ridge,* 356 U.S. 525, 540 (1958).

Because a motion for a new trial, unlike a motion for directed verdict or for judgment notwithstanding the verdict, does not seek a final judgment, but another trial, the judge may on a motion for a new trial set aside the verdict even though there is substantial evidence to support it. *Altrichter* v. *Shell Oil Co.,* 263 F.2d 377, 380 (8th Cir. 1959); *Moist Cold Refrigerator Co.* v. *Lou Johnson Co.,* 249 F.2d 246, 256 (9th Cir. 1957).

This is the "weight of the evidence" standard applied by the trial judge. The standard expressly contemplates the exercise of judicial discretion, and—plaintiffs' unsupported assertions to the contrary notwithstanding (Pet. 17)—there is nothing uncertain about this standard, nor is there any conflict among the circuits with respect to it.

There is likewise nothing to suggest that the trial judge substituted his view of the evidence for that of the jury (*contra,* Pet. 20-21). Plaintiffs' attempt to show that the trial court used an inappropriate standard for review by quoting from the court's later opinion rejecting their application for an interlocutory appeal under 28 U.S.C. 1291(b). These arguments rely on a purposeful misconstruction of the court's references to adopting "a view of the case" and "a view of the evidence." They imply that such phrases are somehow an admission of error.

Plaintiffs go on to point out that the district court believed that its "view of the evidence" was "supported by substantial evidence." Presumably plaintiffs mean to imply that the district court was stating that it had granted the new trial because there was substantial evidence contrary to plaintiffs' theories. That is clearly not a fair or accurate reading of the court's statement.

The "view of the case" and "view of the evidence" to which the court referred are the views it took in its prior opinion; that is, that there was sufficient evidence in the record to *deny* defendants' motion for judgment notwithstanding the verdict, but that prejudicial errors in admitting evidence, the overwhelming weight of the evidence, and an unfair trial schedule required a new trial. It was this "view" which the court adopted and for which the court said there was "substantial evidence."

C.

The Court Of Appeals Properly Reviewed The Order Granting A New Trial.

Plaintiffs cite one case in which a court of appeals suggested that its scope of review is "somewhat broader" for orders granting new trials than it is for those denying new trial motions. *Massey* v. *Gulf Oil Corporation,* 508 F.2d 92 (5th Cir. 1975). There is nothing in the court of appeals opinion (Pet.App. 13-14) to suggest that it did not review the district judge's order in a manner appropriate to reviewing orders granting new trials. Certainly, no conflict exists between the court of appeals opinion in *Massey* and the appellate decision here, especially in light of the fact that the *Massey* court began its discussion of this issue by stating—in language almost identical to that of the court of appeals here—that: "In this circuit the ruling of a trial judge in either granting or denying a motion for a new trial is reviewable under an abuse of discretion standard." (508 F.2d at 94.) The *Massey* court, moreover, affirmed the district court's order granting a new trial and did so on the basis that the jury's verdict was against the weight of the evidence. (508 F.2d at 98.)

Plaintiffs cite no authority for their thesis that the court of appeals applied an inappropriate standard in reviewing the district judge's new trial order, and the case law is clear that the grant or denial of a new trial by a federal district court should not be reversed except upon a showing of a "clear abuse of

discretion." *Hahn* v. *Becker,* 588 F.2d 768, 771 (7th Cir. 1979); *Durant* v. *Surety Home Corp.,* 582 F.2d 1081, 1088 (7th Cir. 1978); *Hanson* v. *Shell Oil Co.,* 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied,* 429 U.S. 1074 (1977); *Stinebower* v. *Scala,* 331 F.2d 366, 367 (7th Cir. 1964).

III.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DENIAL OF PLAINTIFFS' MOTION FOR A THIRD TRIAL.

A.

The District Court's Restraint Of Trade Instruction Was Not Erroneous.

Plaintiffs contend that the court of appeals erred in not granting them a third trial based upon the district court's instruction at the second trial concerning restraint of trade (Pet. 23-24). As the court of appeals held, however, the challenged instruction on restraint of trade is a correct statement of the law. The court's instruction, only a portion of which plaintiffs criticize, was that (Pet.App. 22-23):

> The term "restraint of trade," which must be the objective or effect of any contract, combination or conspiracy condemned by the anti-trust laws contemplates only an unreasonable restraint of trade. The law recognizes that it may be impossible to conduct a business without in some degree restraining trade. The antitrust laws were enacted for the protection of competition, not competitors. The plaintiffs must, therefore, establish that the defendants' acts injured not only the plaintiffs themselves, but competition in the leasing of office rental space in the central business district of the City of Milwaukee.

> The plaintiff is not entitled to recover in this case by showing that concerted activities of the defendants restrained interstate commerce in some degree. They must also show that there was an unreasonable restraint. A restraint is unreasonable if it tends or is reasonably calculated to prejudice the public interest. It is for you to decide whether the evidence in this case shows an unreasonable restraint, and the plaintiff may not recover unless you find an unreasonable restraint by preponderance of the evidence as defined in these instructions.

Plaintiffs challenge only the last two sentences of the first paragraph quoted above. The first of these sentences is a direct quotation from *Brunswick* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). See also, *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962). Plaintiffs argue that the instruction was erroneous because they were not required to show actual injury to competition. As the court of appeals correctly stated, however, the Sherman Act requires more than mere injury to a competitor. Plaintiffs must also show that the "effect upon competition in the market place is substantially adverse." *United States* v. *Arnold Schwinn & Co.*, 388 U.S. 365, 375 (1967); and see, *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Magnus Petroleum Co.* v. *Skelly Oil Co.*, 599 F.2d 196, 204 (7th Cir.), *cert. denied*, 100 S.Ct. 231 (1979); *Lee Klinger Volkswagen, Inc.* v. *Chrysler Corp.*, 583 F.2d 910, 914-915 n.6 (7th Cir.), *cert. denied*, 439 U.S. 1004 (1978).

In evaluating plaintiffs' specific complaints about instructions, moreover, one must look beyond individual phrases and sentences and consider the instructions as a whole. See, for example, *Odekirk* v. *Sears, Roebuck & Co.*, 274 F.2d 441, 446 (7th Cir. 1960); Wright & Miller, 11 *Fed. Prac. & Pro.*, § 2886 at p. 293 (1973). In this instance, as the court of appeals noted (Pet.App. 22-23), the criticized language was only part of an entire section of instructions on restraint of trade. Also included in those instructions was the explanation that the purpose of the

Sherman Act "is to preserve and advance our system of free competitive enterprise and to encourage to the fullest extent practicable free and open competition in the market place," as well as the directive (quoted above) that "a restraint is unreasonable if it tends or is reasonably calculated to prejudice the public interest."

The cases cited by plaintiffs (Pet. 23-24) are not to the contrary. The instruction given by the trial judge and which the court of appeals found to be a correct statement of the law, did not tell the jury that it needed to find evidence of public injury before it could render its verdict for the plaintiff. The instruction merely required that plaintiffs prove that the type of injury for which they sought relief under the antitrust laws was injury having an effect upon competition.

B.

The Court Of Appeals Correctly Upheld The Trial Court's Refusal To Give Plaintiffs' Instruction That Defendants' Unfair Competition Was A Per Se Violation Of The Sherman Act.

Plaintiffs assert that a conflict among the circuits has been created by the court of appeals' affirmance of the trial court's refusal to instruct the jury that "unfair methods of competition, when used as part of a conspiracy the object of which is to destroy the business of a competitor, are in and of themselves unreasonable restraints of trade." This assertion is erroneous. Moreover, whatever the status of the law on this issue might be, the instruction sought by plaintiffs would have been improper because there was no evidence that First Wisconsin intended to eliminate plaintiffs as competitors. There was evidence that First Wisconsin wanted to acquire the Juneau Square block (which was situated immediately east of its own headquarters building), but no evidence was introduced that First Wisconsin intended to eliminate plaintiffs or cared whether or not they built or operated office buildings in any other location.

Petitioners' proposed instruction is drawn from the First Circuit's largely repudiated decision in *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir. 1932), and in fact goes beyond that decision in seeking, for the first time, to apply it to potential competition.

The *Pick-Barth* rule was at one time supported by decisions in the First and Tenth Circuits. *Atlantic Heel Co.* v. *Allied Heel Co.*, 284 F.2d 879 (1st Cir. 1960); *Perryton Wholesale, Inc.* v. *Pioneer Distributing Co.*, 353 F.2d 618 (10th Cir. 1965). Both of these circuits, however, have retreated from the rule and have left open the question whether they will apply it in any situation. *Engine Specialties, Inc.* v. *Bombardier Ltd.*, 605 F.2d 1 (1st Cir. 1979), *cert. denied*, 48 U.S.L.W. 3785 (June 3, 1980); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Craig* v. *Sun Oil Co. of Pennsylvania*, 515 F.2d 221 (10th Cir. 1975), *cert. denied*, 429 U.S. 829 (1976).

The basis of repudiation of the *Pick-Barth* rule has been that, by eliminating the need for a showing of effect on competition, it tends to divert the antitrust laws from their proper purpose of preserving competition to the purpose of providing a treble damage remedy for ordinary business torts. See *Northwest Power Products, Inc.* v. *Omark Industries, Inc.*, 576 F.2d 83, 86-90 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979). The repudiation of *Pick-Barth* has gained impetus by this Court's reluctance to extend per se rules and its stress on the fact that the purpose of the antitrust laws is to protect competition not competitors. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977). For these reasons, plaintiffs' claimed conflict among the circuits in respect of the *Pick-Barth* rule is illusory.

In any event, plaintiffs were not entitled to such an instruction, inasmuch as there was no evidence in the record to support it. As plaintiffs themselves recognized in their proposed

instruction, the *Pick-Barth* rule requires an intent not merely to injure but completely to eliminate a competitor. Furthermore, the rule requires a showing of "subjective intent" or "motive". *George R. Whitten, supra,* 508 F.2d at 559-560. As is shown above (pp. 7-8), there is no evidence that First Wisconsin had any concern with or intent to eliminate plaintiffs as competitors, potential or otherwise. Consequently, even if the expanded *Pick-Barth* instruction which plaintiffs sought were an accurate statement of law, the trial court could not properly have given the instruction for want of any evidentiary basis to support it. Accordingly, the result in this case does not place the Seventh Circuit in conflict with any other circuit.

C.

The Court of Appeals Sanctioned No "Radical Departure From The Accepted And Usual Course of Judicial Procedures" In Denying Plaintiffs' Appeal.

Apparently in order to fit their numerous complaints about the two trials into a category appropriate for review under this Court's Rule 17, plaintiffs have gathered together (Pet. 27-29) a miscellaneous collection of supposed grievances, which (they claim) required the court of appeals to reverse the trial judge. These claims are specious.

Plaintiffs first charge (Pet. 27) that the district judge set aside the first verdict on "speculative grounds." The admission of prejudicial hearsay evidence was, as noted above (pp. 12-15) the principal ground on which the court of appeals affirmed the district court's new trial order, and plaintiffs do not contend that there was anything speculative about the district court's evaluation of that evidence. Similarly, plaintiffs—while unhappy with the trial judge's ruling on the weight of the evidence—do not claim that that conclusion was based on speculation. Where plaintiffs do make this assertion, for example with respect to the imbalance of time allowed each of the parties, they are plainly wrong. The district court's opinion explains the problem (Pet.App. 88-89):

> The plaintiffs were permitted to proceed at their own pace; the presentation of plaintiffs' case lasted for thirteen weeks. During this period, the jury was inundated with numerous exhibits and extensive testimony of a background nature. The plaintiffs did not reach the relevant period—the period of the actual conspiracy—until the second or third week of trial. Plaintiffs had originally led the Court to believe that the entire trial would last four to six weeks.
>
> By the time the plaintiffs rested, the Court's trial calendar was in a shambles. All the trials previously scheduled for summer and early fall had to be cancelled. Of particular concern was the backlog of criminal trials. In order to comply with the dictates of the Speedy Trial Act, the Court was forced to establish time limitations. As a result, the defendants were pressured to complete their respective cases in little more than three weeks. The impact of this unfortunate set of circumstances on the jury and the defendants cannot be lightly dismissed.

The district judge, who had presided over the five month first trial, was, likewise, uniquely able to assess the likely impact on the jury of the length and complexity of the evidence presented to them (Pet.App. 89-90), as well as to judge the inherent potential for duplication of damages that resulted from plaintiffs' insistence on proving their damages on a "project" basis (Pet.App. 90-92).

Plaintiffs also complain about numerous trial management and evidentiary rulings made by the district judge at the second trial. These rulings were upheld by the court of appeals, and were discussed extensively in the trial court's opinion denying plaintiffs' motion for a third trial (Pet.App. 152-167). Each of the evidentiary and trial management decisions challenged here by plaintiffs is of the sort typically entrusted to the sound discretion of the trial judge, who is in the best position to apply the rules of evidence and to determine the manner in which the trial will proceed. None of these matters meets the standards set forth in Rule 17.

Finally, plaintiffs assert (Pet. 28) that the court of appeals sanctioned a "radical departure from the accepted and usual course of judicial procedures" by declining to instruct the jury at the second trial with respect to a dozen or more issues of state or common law. Since plaintiffs chose to bring a federal antitrust case, and not a common law tort case or an action under state law, this ruling was entirely appropriate. See the district court's discussion of this subject (Pet.App. 144-146).

IV.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE DIRECTED VERDICT ENTERED BY THE DISTRICT JUDGE ON PLAINTIFFS' MONOPOLIZATION CLAIMS.

Upon completion of plaintiffs' case-in-chief at the first trial, the district court granted defendants' motions for directed verdicts on plaintiffs' claims under Section 2 of the Sherman Act. (Plaintiffs did not include this decision of the district court in their appendix, but a copy of the decision is filed herewith, Res.App. 9-17.) The court of appeals affirmed this ruling (Pet.App. 28-30.)

Plaintiffs do not deny that the offense of monopolization under Section 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth. . . ." *United States* v. *Grinnell Corporation,* 384 U.S. 563, 570 (1966). Similarly, plaintiffs do not deny that a charge of attempted monopolization requires proof of specific intent to monopolize and conduct manifesting that intent, combined with a dangerous probability of success. *Photovest Corp.* v. *Fotomat Corp.,* 606 F.2d 704, 711 (7th Cir. 1979), *cert. denied,* 100 S.Ct. 1278 (1980).

Directed verdicts were thus entered against plaintiffs on these issues not because of any difference of opinion as to the operative law, but because plaintiffs failed to present any proof tending to establish the defendants possessed substantial power in the market as they defined it. (Both the trial court and the court of appeals accepted plaintiffs' unsubstantiated and overly narrow geographic and product market definitions for the purpose of ruling on the motions for directed verdict.)

Plaintiffs quarrel with the court of appeals' statement that they presented no evidence of defendants' specific market share at trial, citing as authority only excerpts of the brief they had earlier filed with that court. The market share percentages recited in their brief to the court of appeals were never mentioned in their brief to the trial court on the motion for directed verdict, nor are these percentages percentages of either the market alleged in the complaint, or the relevant market plaintiffs asserted at trial through their expert witness. With neither citation nor explanation, plantiffs then announce (Pet. 29) that they had "introduced more direct evidence of monopoly power: proof that defendants were in fact fixing prices and excluding competition in the market." No such evidence was ever introduced.

It is true, of course, that plaintiffs' expert testified to some of the various factors that might have been relevant to an evaluation of market power. He did not purport to testify, and was not qualified to testify, however, as to First Wisconsin's market share. This supposed expert acknowledged that he did not know what market power was possessed by other lessors of rental office space in downtown Milwaukee and admitted that he had not made an economic evaluation of the relevant market. As the district court noted (Pet.App. 45-46):

> It is quite apparent that plaintiffs' expert relied upon "bigness" in the abstract sense. Failure to consider the power of the other sellers in the market is fatal to plaintiffs' claims of monopolization. There is no evidence indicating that there is an absence of competitors or of substantial competitive office space in the relevant market.

* * *

> In the final analysis, plaintiffs have not met their burden of proof as to the requirement of a showing of monopoly power. This Court would be remiss if it permitted the jury to speculate as to the power of the First Wisconsin defendants in an isolated matter without a consideration of the power of the other sellers in the market place.

Finally, plaintiffs assert—again with neither citation nor explanation—that "the district court found, in effect, that there was evidence from which the jury could find that defendants were in fact in the very process of achieving the forbidden result, thus clearly demonstrating at least a dangerous probability of success" (Pet. 30). The finding of the district court was, in fact, exactly the opposite. Defendants, it said, "are effectively precluded from further expansion in the relevant market" by the federal banking laws and regulations promulgated thereunder. (Pet.App. 49-50.) Cf., *United States* v. *Citizens and Southern National Bank*, 422 U.S. 86, 91 (1975); *United States* v. *Marine Bancorporation*, 418 U.S. 602, 605-606 (1974).

CONCLUSION

For the reasons set forth above, respondents respectfully urge that this Court deny the petition.

Respectfully submitted,

W. DONALD MCSWEENEY
JOHN J. VOORTMAN
PETER V. BAUGHER
REUBEN A. BERNICK

Attorneys for Marshall Michigan and the First Wisconsin Respondents

Dated: October 31, 1980

Appendix

APPENDIX

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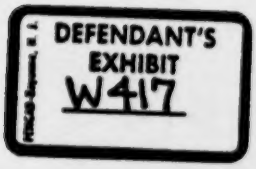
WIL-TEN CO. INC. AND SUBSIDIARIES
(INCLUDING JUNEAU SQUARE CORP.)
DETAIL SUMMARY OF INCOME STATEMENT INFORMATION
U. S. CONSOLIDATED INCOME TAX RETURN

Year	Total Income	Total Deductions	Taxable Income (Loss)	Cumulative Loss From Operations
1960	$ 5,415	$ 10,683	$ (5,268)	$ (5,268)
1961	33,510	40,068	(6,558)	(11,826)
1962	130,417	125,206	5,211	(6,615)
1963	248,101	268,391	(20,290)	(26,905)
1964	445,443	579,992	(134,549)	(161,454)
1965	768,493	781,375	(12,882)	(174,336)
1966	1,032,903	1,103,335	(70,432)	(244,768)
1967	960,042	1,282,140	(322,098)	(566,866)
1968	1,082,110	1,329,806	(247,696)	(814,562)
1969	1,222,263	1,523,835	(301,572)	(1,116,134)
1970	1,172,900	1,244,965	(72,065)	(1,188,199)
1971	1,014,911	1,358,201	(343,290)	(1,531,489)
1972	355,202	530,994	(175,792)	(1,707,281)



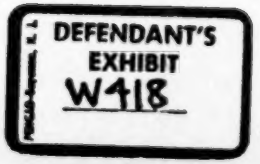
WIL-TEN CO., INC. AND SUBSIDIARIES
(INCLUDING JUNEAU SQUARE CORP.)

SUMMARY OF NET WORTH (1)

Year	Capital Stock	Earned Surplus (Deficit)	Minority Interest	Net Worth(3)	Revaluation Surplus
1960	$40,000	$ (5,268)	$ -	$ 34,732	$ -
1961	40,000	(21,705)	-	18,295	-
1962	40,000	(10,332)	-	29,668	-
1963	40,000	(32,746)	-	7,254	-
1964	45,000	(175,727)	-	(130,727)	-
1965	45,000	(453,640)	698,202	289,562	638,000
1966	45,000	(224,380)	1,513,378 (2)	1,333,998	247,694
1967	45,000	(744,827)	537,652	(162,175)	304,600
1968	45,000	(945,470)	496,085	(404,385)	284,600
1969	45,000	(1,240,836)	1,102,394 (2)	(93,442)	384,600
1970	45,000	(1,456,556)	864,254 (2)	(547,302)	284,600
1971	45,000	(1,781,927)	756,954 (2)	(979,973)	284,600
1972	45,000	(1,957,717)	729,626 (2)	(1,183,091)	284,600

App. 2

(1) Source: U.S. Consolidated Income Tax Return for the year indicated.
(2) Includes investment of Marshall-Michigan Company, Inc.
(3) Excludes revaluation surplus.



JUNEAU SQUARE CORP. AND RELATED COMPANIES

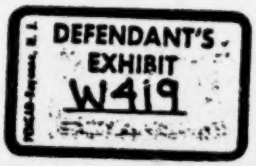
NET INVESTMENT

BY MESSRS. MOERTL, SPODEN AND CONWAY

(Rounded to Nearest Thousands of Dollars)

	Moertl	Spoden	Conway
Juneau Square Operations:			
Investments remaining in the business for a period of one year or more	$47,000	$69,000	$117,000
Disbursements to or on behalf of principals, excluding reimbursement of indicated business expenses and indicated payments to principals as an agent for third parties (1)	49,000	89,000	2,000
Excess investment or (disbursement)	(2,000)	(20,000)	115,000
Wil-Ten Co. Operations:			
Investments remaining in the business for a period of one year or more (2)(3)	71,000	6,000	71,000
Disbursements to or on behalf of principals, excluding reimbursement of indicated business expenses and indicated payments to principals as an agent for third parties (4)	71,000	218,000	69,000
Excess investment or (disbursement)	-0-	(212,000)	2,000
Net excess investment or (disbursement)	$(2,000)	$(232,000)	$117,000

(See explanatory footnotes on next page)



[WX 419, P

(1) Excludes approximately $10,000 of disbursements to principals because of insufficient references in the companies' books and records.

(2) Includes $30,200 of receipts representing items for which references in the companies' books and records are insufficient to classify the amounts.

(3) Excludes approximately $105,000 of amounts noted as notes payable to Messrs. Spoden and Schroeder and approximately $125,000 representing R. W. Conway's interest in the Hartsdale, Kansas City and Capitol Drive projects. A review of the companies' cash receipts records did not disclose any items pertaining to these amounts.

(4) Excludes approximately $55,200 of disbursements to principals because of insufficient references in the companies' books and records.

May 19, 1971

MEMORANDUM FOR MINUTES:

Re: Total Offering $12,000,000.
SWC Wisconsin Ave. & Marshall St.
Milwaukee, Wisconsin

The Real Estate and Mortgage Loan Committee considered this offering and concluded that The Midland National Bank did not qualify according to our requirements as a joint venturer or for master lease purposes.

Donald Allen
Sec'y R.E. & Mtge. Loan Committee

W - No
[illegible] - No
[illegible] - Yes
[illegible] - No
[illegible] - "
[illegible] - "

PLAINTIFFS' EXHIBIT 588

PX 406

Referred to MORTGAGE L[illegible] MANAGER FAULKNER

Phil:-

After you have had an opportunity to digest the attached material, I'd like you to go over in your own mind as to how he handled this conversation and fill me in by phone. I am very concerned with my findings.

WILLIAM C. LUTZ
Vice President in charge of
Real Estate and Mortgage Loans

6/22/71

Krause original conversation work up.

our file copy

NEW YORK LIFE

OFFICE MEMORANDUM

DATE June 22, 1971

TO FILE

SUBJECT Dick Krause
Baird & Warner
Milwaukee Office

FROM William C. Lutz

The proposed joint venture and mortgage loan involving Juneau Square Corporation and Midland National Bank in Milwaukee resulted in some alleged statements being made by Dick Krause to our Manager Faulkner who quite properly conveyed them to Regional Officer Wilford who referred them to the Home Office. The matter was serious enough to warrant checking the information out with Mr. Krause. This resulted in a conference call involving Fred Duncan and myself, during which call Mr. Krause said there was a misunderstanding - that the two officers of First Wisconsin Bank were simply interested in knowing whether the applicants were actually seeking a loan, etc., etc.

Since this conversation created a creditability gap, I talked to Mills Perry of Mortgage Associates, who formerly employed Dick Krause. The results of that conversation leave little doubt but that Mr. Krause is considered capable of doing anything to make a deal. It is my opinion that we keep this knowledge to ourselves and bear it in mind when dealing with this man in future transactions.

WCL

Vice President

WCL:PH

Confidential copies to Assistant Vice President Wilford
Mortgage Loan Manager Faulkner
Treasurer Duncan

OFFICE MEMORANDUM

On tape
DATE May 28, 1971

FILE

William C. Lutz

SUBJECT: Proposed loan - joint venture to be formed with following participants: Juneau Square Corporation and Midland National Bank - SWC Wisconsin Avenue an Marshall Street, Milwaukee, Wisconsin

In a discussion with Regional Officer Wilford (later confirmed by Manager Faulkner) I learned that Dick Krause, who manages Baird & Warner's Milwaukee Office, had made certain remarks about telephone calls that were exchanged between him and two officers of the First Wisconsin Bank. He allegedly was told that the bank was interested in knowing whether the applicants, or anyone associated with them, had any "clout" with New York Life. In their conversation they allegedly claimed they didn't want this building built, apparently because it would interfere with the timing of the leasing in their proposed building. The intimation was that there were veiled suggestions that First Wisconsin would use their best efforts to delay or interfere with the construction of this building.

I acquainted Fred Duncan with this information and then called Manager Faulkner to ask whether he would be embarrassed if Fred Duncan and I talked in a conference call with Dick Krause of Baird & Warner. He said certainly not and again confirmed that he had been told two different officers of the bank had called Dick Krause.

Fred and I then phoned Dick Krause but received contradictory information from him. He admitted that two bank vice presidents had called him but stated they had simply wanted confirmation of the fact that an application along the terms they had been advised had been submitted to New York Life.

Then, in answer to a question from Fred Duncan, he confirmed that construction had already started on First Wisconsin's building; that construction being excavation which is now under way. He also confirmed that super-adequate foundation is necessary to sustain the 42-story building that will be built on that site.

In further questioning Dick Krause claimed that the bank came into this deal on invitation from Baird & Warner and the bank insisted that if in the joint venture, they wanted to control the developer, and it was in this way that they came to be given controlling interest in Juneau Square Corporation's

operations. He also claimed that the bank had many people behind them who were ready and willing to put up the capital necessary between the floor loan and the ceiling loan.

This information has been conveyed to Manager Faulkner who expressed surprise at Mr. Krause's comments to us. He claims the Oliver Tyrone people are very interested in the project but want to redesign the building. I've cautioned him that this would delay construction and our principals would lose the advantage they now have of being able to come on the market about one year ahead of competing building.

Phil and Dick will review the prospects of other moneyed principals backing the Midland Bank principal to cover funds between the floor and maximum loans.

Vice President

WCL:S

A.S 4

PX 407 - p. 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JUNEAU SQUARE CORP., et al.

Plaintiffs,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, et al.

Defendants.

Case No. 72-C-533

MEMORANDUM AND ORDER

At the conclusion of plaintiffs' case in chief, defendants moved for directed verdicts pursuant to rule 50 of the Federal Rules of Civil Procedure. Defendants have set forth various grounds in support of the aforestated motions in urging the Court to find that there is insufficient evidence in the record upon which the jury could properly find a verdict for plaintiffs. In reviewing the record, the Court is precluded from weighing the evidence or passing upon the credibility of witnesses or substituting its judgment for that of the jury. *See,* Wright & Miller, Federal Practice and Procedure: Civil § 2524 at 543. The Court must in effect view the evidence in a manner favorable to the plaintiffs and draw all reasonable inferences in support of plaintiffs' case. *Continental Co.* v. *Union Carbine,* 370 U.S. 690 (1962); *Valdes* v. *Karoll's, Inc.,* 277 F.2d 637 (7th Cir. 1960).

* * *

III.

Defendants' claim that there is insufficient evidence in the record from which the jury could properly find the existence of monopolization or an attempt to monopolize on the part of the First Wisconsin defendants or a conspiracy to monopolize on the part of the other defendants. Plaintiffs concede that there is insufficient evidence to support a claim of monopolization or an attempt to monopolize on the part of Aetna or Marshall-Michigan.

Although the First Wisconsin defendants challenge plaintiffs' definition of relevant market and defined product,[3] they principally rely upon the lack of proof of monopoly power within the relevant market. It is clear that "the offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth . . ." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570 (1966). Monopoly power is defined as the power to control prices or exclude competition. *United States* v. *DuPont & Co.*, 351 U.S. 377 (1955).

Monopoly power is assessed by the percentage share of the relevant market as the existence of a substantial market share is highly probative of the alleged monopolist's ability to control prices or to exclude competition. Although the Supreme Court has never adopted a set standard, Judge Hand in *United States* v. *Aluminum Co. of America,* 148 F.2d 416, 424 (2d Cir. 1945), established guidelines which have been generally accepted as an accurate measure of monopoly power:

---

[3] The Court is persuaded that there is sufficient evidence in the record to support an inference that the relevant market is the Central Business District and that the product is readily available office space which is defined as vacant space and that occupied space which would be readily available within a reasonable time period. The exact time limitations of the latter category were not accurately defined by plaintiffs' expert, but the estimate was anywhere between 2-9 months.

> [Ninety percent] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not.

The Seventh Circuit has adhered to these guidelines. *Kearney & Trecker Corporation* v. *Giddings & Lewis, Inc.*, 452 F.2d 579 (7th Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972); *Bendix Corporation* v. *Balax, Inc.*, 471 F.2d 149 (7th Cir. 1972).

Plaintiffs rely upon *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948) and *Kearney & Trecker Corp.* v. *Giddings & Lewis, Inc., supra*, for the proposition that the existence of monopoly power does not require proof of a particular percentage share of the relevant market. If by this, plaintiffs suggest that the Supreme Court has not articulated a particular percentage figure in the sense that one selects 60 or 65 or 70 percent as a cutoff, this Court has no quarrel with the proposition. It is quite another thing to suggest that the Supreme Court has obviated the need for a showing that defendants control a substantial share of the relevant market. Neither the authority cited above nor any other authority brought to the Court's attention has suggested such a proposition.

Judge Hand indicated that sixty (60) percent would probably not be a sufficient showing. A review of recent caselaw indicates that in most cases the percentage figure is much higher. The Court need not concern itself with whether plaintiffs have established a sufficient market share because the record is practically devoid of such evidence. This total absence of proof is revealing in light of the fact that figures are presumably available and that plaintiffs represented in their briefs and supporting affidavits in opposition to the motions for summary judgment that such figures were available.

Plaintiffs concede that they have not established the market share controlled by the First Wisconsin defendants. In lieu thereof, they argue that market share is merely a means to help

determine whether or not a defendant has power to control prices or exclude competition and that monopoly power may be proven more directly by other means:

> Monopoly power can, of course, be proved by evidence of the exercise of actual control over prices or the actual exclusion of competitors. When such evidence is lacking, the existing monopoly power over the relevant market may be proved in other ways. In such cases a *full* and *complete economic evaluation* of the structure of the market and its functioning is necessary to determine whether, considering all factors, including *the relative size and strength of competitors, freedom of entry, pricing trends* and *practices, profits,* and *consumer demands,* the firm's power over supply, prices or entry is of such a nature as to constitute a monopoly. (emphasis added). *Antitrust Law Developments,* A.B.A. at 53 (1975)

The difficulty with plaintiffs' position is that they failed to make a full and complete economic evaluation of the structure of the market.

Plaintiffs' expert testified as to various economic factors including, *inter alia,* the existence of inherent barriers to entry in the market, the existence of economic power on the part of the First Wisconsin defendants because of its large assets and position as the largest bank in the State of Wisconsin, the fact that some of the directors of the First Wisconsin defendants are also directors of other large corporations, and the fact that First Wisconsin is able to subsidize its Juneau Square properties at a loss.

Notwithstanding the foregoing, plaintiffs' expert testified that he was uncertain as to the power in the market in the hands of *other sellers* of the product, and, in effect, conceded that he had not made a *complete* economic evaluation of the relevant market. It is quite apparent that plaintiffs' expert relied upon "bigness" in the abstract sense. Failure to consider the power of the other sellers in the market is fatal to plaintiffs' claims of

monopolization. There is no evidence indicating that there is an absence of competitors or of substantial competitive office space in the relevant market.

The little evidence in the record indicates that the market is saturated with sellers and readily available office space. Plaintiffs' exhibit 591 is a copy of a market study prepared by the Urban Investment and Development Co. for the Milwaukee Development Group, Inc. The study clearly indicates that although First Wisconsin is the largest seller in the market, it is but one of many. These figures are admittedly imprecise, but the study indicates that there is substantial competition from the MGIC building, the First Federal Plaza, the Marine Plaza, the Century Building, the Plankinton building, and many others. The four buildings listed above alone possess as much vacant space as the First Wisconsin Center.

Moreover, the study reveals that there is a varied price structure and that competitors do charge less and are in direct competition with the First Wisconsin defendants. Plaintiffs have submitted evidence from which the jury could infer that the First Wisconsin defendants charge more than any other competitor but that is their prerogative. There is no proof in the record that such prices in any way affect the prices charged by competitors and absent a showing that defendants control a substantial share of the market, there is no evidence in the record to support the inference that lessees are forced to accept the so-called monopolistic prices of the First Wisconsin defendants.

Plaintiffs' expert placed much reliance on the fact that the First Wisconsin defendants set their prices upon the ground that the only real competition in "first class" office space was the MGIC building and the First Federal Plaza. The difficulty with this approach is that plaintiffs have not defined the product as available first class office space in the Central Business District. It goes without saying that first class office space is limited to the newer and more prestigious buildings of Milwaukee. Of

these buildings, the First Wisconsin defendants definitely have an edge because of the imposing size of the First Wisconsin Center. The fact remains that the more prestigous buildings logically charge and conceivably are able to receive more for their office space. But here we are dealing with all of the available office space in the Central Business District which includes first class office buildings as well as the other office buildings in the relevant market.

In the final analysis, plaintiffs have not met their burden of proof as to the requirement of a showing of monopoly power. This Court would be remiss if it permitted the jury to speculate as to the power of the First Wisconsin defendants in an isolated manner without a consideration of the power of the other sellers in the market place.

IV.

Defendants also challenge the claim of attempt to monopolize principally upon the ground that there is no evidence from which the jury could find that there is a "dangerous probability" of monopolization.

> The phrase "attempt to monopolize" means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it, which methods, means and practices are so employed by the members of and pursuant to a combination or conspiracy formed for the purpose of such accomplishment. *American Tobacco Co.* v. *United States,* 328 U.S. 781, 785 (1946).

At the outset, it should be noted that plaintiffs have not established the market share of the defendants as discussed in part III of this opinion. Of course, plaintiffs need not show that defendants control a substantial share of the market, but proof of *some* share of the market is highly probative of the issue of whether a "dangerous probability" of monopolization exists. The absence of this critical economic data forces the jury to speculate as to the existence of any market share.

Regardless of the failure of proof cited above, the Court must concern itself with the issue of whether defendants' conduct, if continued, is likely to lead to monopoly power in the relevant market. Defendants raise two issues in this regard. First, attention is called to the fact that the First Wisconsin defendants have already indicated in writing to the Deputy Controller of the Currency and the Regional Administrator of National Banks their intention to sell the former office building and have attempted to sell it for some time. This sale, if effectuated, would drastically reduce defendants' share of the relevant market. This intent, it is argued, is clearly inconsistent with the requirement of a showing of specific intent in claims of attempted monopolization. Plaintiffs assert that defendants have not seriously attempted to dispose of the building but that in and of itself does not eliminate the requirement that First Wisconsin must eventually sell the building thereby reducing its market share.

Even if First Wisconsin manages to hold onto its former office building, further expansion into the market is proscribed by federal banking regulations. As such, this situation is analogous to that found in *Bendix Corporation* v. *Balax, Inc.*, 471 F.2d 149 (7th Cir. 1972). There a finding of invalidity with regard to certain patents effectively precluded the consummation of a monopoly. Without the patents, the alleged monopolization could not succeed.

In the case at bar, defendants are effectively precluded from further expansion in the relevant market by the following:

> A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:
>
> First. Such as shall be *necessary* for its *accommodation in the transaction of its business.*
>
> Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.
>
> Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

> Fourth. Such as it shall purchase as sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.
>
> But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years. (emphasis added) 12 U.S.C. § 29.

Regulation 7.3005 promulgated thereunder provides as follows:

> Real estate necessary to the accommodation of the bank's business includes real estate other than that upon which bank buildings are located. Thus, real estate use for parking facilities and data processing centers is necessary in the transaction of business. Such real estate also includes that held for future banking use, where the bank in good faith expects to utilize such property as bank premises. This will permit a prudent program of property acquisition for future bank use. Such real estate is to be treated as bank premises owned and so reported. 12 C.F.R. 7.3005.

Defendants cannot avoid these statutory provisions and regulations. Moreover, the Bank has sufficient space for expansion purposes for the next several decades. There is no way that the First Wisconsin defendants can obtain the substantial market share proscribed by the antitrust laws of the United States. In fact, the defendants are obligated to sell the former bank building as discussed above. Under these circumstances, the jury could not properly find the existence of a dangerous probability of monopolization.

Without reviewing the evidence of conspiracy to monopolize against Aetna and Marshall-Michigan, it is clear that plaintiffs' claims must fail because of a failure to prove monopolization or attempt to monopolize as discussed above.

One cannot conspire to monopolize without the existence of monopoly power or even the existence of a dangerous probability of monopolization in the one party which is alleged to be the monopolist. Defendants' motions for directed verdicts as they relate to the claims of monopolization, attempt to monopolize, and conspiracy to monopolize must therefore be granted.

NOW THEREFORE IT IS ORDERED that the motion of the Aetna Casualty & Surety Company for a directed verdict be and is hereby GRANTED;

IT IS FURTHER ORDERED that the motions of the Aetna Life Insurance Company, Marshall-Michigan Company, Inc., and the First Wisconsin defendants for directed verdicts be and are hereby DENIED as they relate to the claims in restraint of trade and be and are hereby GRANTED as they relate to the claims of monopolization.

So ordered this 30th day of September, 1976, at Milwaukee, Wisconsin.

ROBERT W. WARREN
United States District Judge

Supreme Court, U. S.
FILED
NOV 18 1980
MICHAEL RODAK, JR., CLERK

No. 80-517

In the Supreme Court of the United States

OCTOBER TERM, 1980

JUNEAU SQUARE CORP., et al.,

Petitioners,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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11 Wright and Miller, Fed. Prac. & Proc. §2819, p. 120-1 6

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6A Moore, Fed. Prac., §59.08[5] 5

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-517

JUNEAU SQUARE CORP., et al.,

Petitioners,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

I. REPLY TO "COUNTERSTATEMENT OF FACTS".

Respondents First Wisconsin defendants and Marshall-Michigan ("FW/MM") seek to discourage review of this case by flagrantly misstating the record.

The conspiracy among the First Wisconsin companies and NML to control the supply of office space onto the market[1] was established by voluminous evidence (e.g., App. 263-4) and confirmed by the court of appeals (App. 4).

[1] FW/MMs' contention all acts specifically aimed at plaintiffs were done by conspirators other than NML is a strawman. The First Wisconsin companies, NML and others conspired *to restrain trade*. All such conspirators need not be aware of or participate in each act to further the aims of the conspiracy. *T.V. Signal Co. of Aberdeen v. A.T. & T. Co.*, 462 F. 2d 1256 (8th Cir. 1972).

FW/MMs' history of Juneau Square consists of half truths and errors.[2] The true facts were faily described by the trial court (App. 54-56) and the court of appeals (App. 2-4). The Juneau Square developers did not have or pretend to have a deep pocket. Their project was viable, but vulnerable because it needed long term financing.[3] Realiz-

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[2] E.g., plaintiffs were not "forced to sell off" 50% of the project; Marshall-Michigan approached the plaintiffs unsolicited. If FW/MMs' version of the project remotely approached the truth, Marshall-Michigan's $1,000,000.00 cash investment would have been unthinkable. Also, Juneau Square Corp. did not sell 75% of the project "while remaining obligated to pay 50% of the Aetna mortgage and 100% of the remaining debts." The sales were *sale and leasebacks* (with options to repurchase) under which Juneau Square Corp. made fixed payments to the investors and got *all* remaining income from the project. The "remaining debts" were mainly loans made by the owners of Juneau Square Corp. The exhibits reprinted in FW/MMs' appendix (at 1-4) were impeached. The trial judge commented that the exhibits had been "eroded" on cross examination, "particularly 419." They erroneously treat depreciation as a cash loss and a real loss in value of real estate. Correcting for such errors established a positive book value of over $1.2 million and an actual value of several million more because of *appreciation* in market value of the real estate.

[3] FW/MMs' statements plaintiffs approached "20 or 30" firms for financing are another distortion. Until the Aetna declination of March 11, 1969, plaintiffs dealt only with Aetna. They went to numerous sources thereafter because of the conspiracy's serial obstruction of plaintiffs' financing negotiations (see App. 263-289). It is also a half truth (FW/MM 6) that "plaintiffs never obtained the financing they sought." Plaintiffs got a $12.5 million dollar commitment from Diversified Financial Services of America (frustrated by the refusal to extend the stipulation deadlines); a commitment from General Electric Pension Trust for the sale and leaseback as part of the Metropolitan financing (destroyed along with the Metropolitan financing), and a preliminary commitment from Baird & Warner REIT (destroyed by Marshall-Michigan's entry of judgment January 2, 1972). FW/MMs' assertion (p. 6) financing was not achieved ". . . because Juneau Square Corp.'s debts were mounting steadily" is also wrong. No lender declined financing because of alleged debts.

ing this, that is where the conspirators aimed their principal shots. Had plaintiffs obtained mortgage financing, the project would have been completed and of great value. The New York Life field man stated:

> In summary, we are offered a building with an ideal view overlooking Milwaukee Harbor surrounded by quality type anchored establishments, immediate access to the metropolitan freeway system and a very strong office market in which the subject has already enjoyed a successful penetration. The sponsorship presently has the necessary balance between expertise and capital to see the project through to successful completion. (See petition at 10).

FW/MMs' central claim of innocent motivation is supported only by self-serving statements of bank officials.[4] It conflicts with the trial court's analysis (App. 72-73) and with numerous facts: the documented agreement among the First Wisconsin companies and NML to restrain the supply of office space onto the market; First Wisconsin's reports to stockholders and the SEC saying adequate expansion space for the foreseeable future exists in the First Wisconsin Center alone; First Wisconsin's own rental studies (App. 186-187) acknowledging the adverse impact of "possible new buildings" *including Juneau Square East;* First Wisconsins's rental rates expressly predicated on *reduced* competition (App. 189-195). See trial court at App. 72, 80.

FW/MMs' argument (at 7) to disguise the competition factor (that some Juneau Square East space would be used by expansion of existing tenants in North and South[5])

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[4] No corroborating independent witness or document was produced at either trial. The assertion First Wisconsin and NML favored competitive development is without foundation.

[5] FW/MM hyperbolize (at 19) "East would be filled *largely* by existing tenants" in North and South. Only 20% of Juneau Square East's 300,000 sq. ft. was to have been so used.

is a non sequitur: if East were not built, expansion need would mean demand for space in the First Wisconsin Center. Their claim (at 8) First Wisconsin was "competing (sic) for a different class of tenants" is false. There is no relevant distinction between the tenants in First Wisconsin Center and those in Juneau Square.[6]

FW/MMs' central claim there was no evidence of anticompetitive motivation or behavior is simply false and was not accepted by either court below.

II. FW/MM MISSTATE THE OPINION OF THE TRIAL COURT

FW/MM attempt to justify the new trial decision by shuffling the trial court's treatment of the issues, to create the impression certain "make weight" arguments played a major role in the grant of a new trial. The district court's decision (App. 51-96), fairly read, plainly turns on the weight of the evidence. As to the hearsay issues emphasized by FW/MM (p. 12-15), the court of appeals recognized that even if erroneous, admission of that evidence "hardly seems sufficient to warrant a new trial" (App. 19). The other alleged grounds are upon analysis insubstantial and erroneous. See App. 290-296.

III. THE TRIAL COURT'S ERRONEOUS AND UNCONSTITUTIONAL WEIGHT OF THE EVIDENCE TEST.

This issue is fundamentally important to federal trial practice, but FW/MM evade it.

A new trial motion is unquestionably addressed to the trial court's discretion. What *standards* the trial court is to apply in exercising its discretion, however, is un-

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[6] Typical tenants for the First Wisconsin Center were: Prudential Insurance Company, Reliance Insurance Company and Youngstown Steel Products. Typical tenants for Juneau Square (North and South) were: Aetna Life Insurance Company, Travelers Insurance Company, Mutual of Omaha Insurance Co., Proctor & Gamble Distributing Co., Armor Dian, Inc. and Eli Lilly & Company.

settled. Compare 11 Wright and Miller, Fed. Prac. Proc., § 2806, p. 42; 6A Moore, Fed. Prac., §59.08[5]; 10 Cyc. Fed. Proc. (3rd edition, 1968), §3407, p. 69; *Lind* v. *Shenley Industries, Inc.*, 278 F.2d 79, 89 (3 Cir. 1959) ("There is . . . little authority on what standards are to be applied . . . [and the] . . . few available authorities are conflicting"); *Firemen's Fund Insurance Co.* v. *Aalco Wrecking Co., Inc.*, 466 F2d 179 (8 Cir. 1972). Failure to employ the correct standards in ordering a new trial is not an exercise of *sound* discretion and is ". . . subject to the correcting power of the appellate court below and this court." *Langnes* v. *Green*, 282 U.S. 531, 541-2 (1931).

The trial court should be particularly reluctant to set aside a jury's determination: First, where the only question is which witness is to be believed on a simple fact issue. *Lind* v. *Shenley Industries, Inc.*, supra. This case as a whole was complex; but the pivotal fact issue for the courts below was a simple one—did the First Wisconsin's slanderous credit report cause New York Life to decline its mortgage loan? If the jury believed the contemporaneous memorandum and accompanying Lutz testimony (App. 180-183), as well as extensive additional circumstantial evidence (App. 263-8, 276-86), plaintiffs won the issue. Second, in conspiracy cases, where plaintiffs normally *must* rely on inferences and circumstantial evidence, the proof is in hostile hands and conspirators and their friends will deny or obscure the truth. *Poller* v. *C.B.S.*, 396 U.S. 464, 473 (1962); *Interstate Circuit, Inc.* v. *U.S.*, 306 U.S. 208 (1939); Sullivan, *Antitrust* (1977), p. 312.

The court in its new trial decision engaged in an extensive "weighing of the evidence," its central ground for the new trial. (App. 82-85). In denying plaintiffs' 1292(b) motion (App. 101-3) the trial court explained how it arrived at its own verdict, so to speak, and then discarded the jury's verdict because it differed. Put another way,

the trial court did what all courts and writers condemn· substitute its judgment for that of the jury.

IV. THE COURT OF APPEALS' FAILURE TO REVIEW THE DISTRICT COURT'S WEIGHT OF THE EVIDENCE TEST AND IMPROPER USE OF A SUPPOSED INSTRUCTIONAL ERROR AS GROUNDS FOR THE NEW TRIAL.

FW/MM ignore these issues, even omitting the supposed instructional error (expressly included by the trial court) in their description of the trial court's grounds for a new trial. As set forth in our petition (at 20) this error rendered the new trial order jurisdictionally invalid.

V. SCOPE OF APPELLATE REVIEW.

The authority for differentiating in appellate review between orders granting and orders denying a new trial is not limited to "one case" (FW/MM 17), *Massey* v. *Gulf Oil Corp.*, 508 F 2d 92 (5th Cir. 1975). The Third and Eighth circuits make the same distinction. *Lind* v. *Shenley Industries,* supra (p. 90); *Firemen's Fund Insurance Co.* v. *Aalco Wrecking Co., Inc.,* supra (p. 187); see also 11 Wright and Miller, Fed. Prac. & Proc. § 2819, p. 120-1.

FW/MM then argue "nothing in the court of appeal's opinion" suggests it failed to make the distinction. To the contrary, the Seventh Circuit described its scope of appellate review here as "exceedingly limited" and relied on three cases affirming *denials* of new trial motions. App. 13.

This too is an issue of continuous and fundamental importance to federal appellate practice not yet ruled upon by this court.

VI. FACTUAL ERROR IN COURT OF APPEALS' DECISION.

Our petition (at 21-22) sets forth a factual error on a point *critical* to the court of appeals' decision: its plain mistake in confusing two exhibits. FW/MMs' brief could not and did not answer this.

VII. PROOF OF ACTUAL INJURY TO COMPETITION IS NOT AND SHOULD NOT BE REQUIRED OF PRIVATE PLAINTIFFS IN RULE OF REASON CASES.

The court of appeals' decision erects a new barrier to private antitrust actions by requiring proof defendants' conduct caused *actual* harm to competition. The court of appeals (App. 24) and FW/MM (Br. 19) rely mainly on *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 375 (1967), and *Continental T.V. Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977).

Under *Schwinn* (388 U.S. at 375), if defendants' conduct or motive is predatory, as here, inquiry as to the precise effect upon competition is unnecessary. In *Continental T.V.* (433 U.S. at 49, n. 15) this Court quoted with approval from *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918):

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as *may* suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before or after the restraint is imposed; the *nature of the restraint* and its effect, actual *or probable.* (Emphasis supplied).

Plaintiffs should thus be required to prove only *potential* injury to competition. This Court should decide this for rule of reason cases, as it has for *per se* cases, and thereby resolve the conflict this case has created between the 7th and 2nd Circuits (see P.Br. 23-24).

VIII. USE OF UNFAIR MEANS BY ONE MAJOR COMPETITOR TO ELIMINATE ANOTHER SHOULD BE ILLEGAL PER SE WHEN THE PURPOSE IS TO DESTROY COMPETITION.

Rules of *per se* illegality are appropriate for manifestly anti-competitive conduct. *Continental T.V., Inc.* v. *GTE*

Sylvania, Inc., supra. Respondents' conduct falls squarely within the definition of conduct illegal *per se*. *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 5 (1958).

There is no real risk of importing general unfair competition law into antitrust (the concern on which criticism of the so-called *Pick-Barth* cases has rested) because we are dealing here not with competition by unfair means but the elimination of competition by destruction of a major competitor through means that are unfair and without redeeming business value. The conflict among the circuits shown at pages 25-26 of the petition is very real, yet there appears to be overall approval of the use of *per se* rules in cases such as this.

Whether the *per se* rule should extend to elimination of a *potential* competitor (R.Br. 21) is not in issue. Juneau Square and First Wisconsin were actual competitors because they owned existing competing buildings and because their new buildings, though not completed, were the subject of active leasing activity and marketing. Indeed, a major competitive advantage for petitioners and fear for respondents was that Juneau Square East was to come on the market a year or more ahead of the First Wisconsin Center. App. 3-4.

The claim there was no evidence respondents intended to eliminate petitioners as competitors is specious. They *did* eliminate them, as they planned from the beginning (PX 304-App. 170-179), and produced no believable evidence of a non-anticompetitive motive for doing so, as the trial court recognized. App. 72-73.

IX. RADICAL DEPARTURES FROM PROPER JUDICIAL PROCEDURES DEPRIVED PETITIONERS OF CIVIL DUE PROCESS.

As discussed above, the hearsay/weight of the evidence reasoning on which the courts below relied to set aside

the first verdict was the product of error. The remaining grounds were purely speculative (Pet. at 27 and App. 290-296). FW/MM have not attempted to and cannot show the trial court did more than speculate as to the *possible* (but not *found* or even *likely*) existence of these factors and their impact on the jury. No actual prejudice to FW/MM was demonstrated even by them.

The verdict in the second trial[7] was the product of procedural errors of the most serious kind, including denial of cross-examination, misleading rearrangement of deposition testimony and marked favoritism in evidence rulings and time restrictions. (Petitions at 28). FW/MM have not met thees issues but—like the court of appeals—swept them under the rug of "discretion." This court should not permit such fundamental deprivation of civil due process to go unexplained and uncorrected.

X. SUSTAINING A DIRECTED VERDICT ON PETITIONERS' ATTEMPT TO MONOPOLIZE CLAIM CONFLICTS WITH RULINGS OF THIS COURT AND OF OTHER COURTS OF APPEALS.

FW/MMs' argument on this point (at 24-25) is diversionary. The issue is whether the trial court properly directed a verdict on the issue of attempt to monopolize for failure to establish defendants' exact market share (App. 30-31) when it also found that more direct evidence of monopoly power existed: defendants' present ability to charge rentals at higher than competitive rates (App. 80). The issue was not defendants' specific intent but the existence of a dangerous probability of success. The court

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[7] The petition (at 16) mistakenly states the second verdict was for the defendants "on all issues." The case was submitted to the jury on a special verdict. The jury answered only the first question (whether defendants conspired to restrain trade unreasonably) and were thus not required to answer the remaining questions. App. 248-251.

of appeals and the trial court misconstrued the meaning of the latter element.

There is considerable conflict among the circuits as to what "dangerous probability of success" means in attempt to monopolize cases. Compare the 7th Circuit's earlier ruling in *Kearney and Trecker Corp.* v. *Giddings & Lewis, Inc.*, 452 F.2d 579, 598 (7 Cir. 1971), *cert. denied* 405 U.S. 1066 (1972), with *United States* v. *Empire Gas Corp.*, 537 F.2d 296 (8 Cir. 1976), *cert. denied* 429 U.S. 1122 (1977), and *Greyhound Computer Corp.* v. *IBM Corp.*, 559 F.2d 488 (9 Cir. 1977), *cert. denied* 434 U.S. 1040 (1978).

Only *Kearney and Trecker* is consistent with this Court's rejection of the "numbers" approach to market power in *United States* v. *Columbia Steel Co.*, 344 U.S. 495, 527-528 (1948), emphasizing instead the *actual or threatened* impact of the defendants' power in the relevant market.

This Court should make clear that where a defendant is in fact able to charge higher than competitive rates it is not necessary to establish its precise percentage of the market.

Respectfully submitted,

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Dated: November 14, 1980.